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IN THE

Supreme Court of the United States

KNICKERBOCKER ICE COMPANY,
Plaintiff in Error,

vs.

LILLIAN E. STEWART,
Defendant in Error.

Supplemental Brief on Behalf of Plaintiff in Error Filed by Permission of the Court.

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IN THE

Supreme Court of the United States

October Term, 1919. No. 543

KNICKERBOCKER ICE COMPANY,
Plaintiff in Error,

vs.

LILLIAN E. STEWART,
Defendant in Error,

INTRODUCTORY STATEMENT.

This brief is filed by permission of the Court, and consists solely of the recent opinion of the Supreme Court of California, as yet unreported, in the case of *Sudden & Christenson, A Corporation, Petitioner, vs. The Industrial Accident Commission of the State of California, A. J. Pillsbury, Will J. French and Meyer S. Lissner, as members of and constituting said Commission, and Maria Soarez and Carmina Soarez, by Mira Soarez, her guardian ad litem, Respondents, S. F. No.* 8882. 37 Calif. 310

This was a case similar in its essential facts to the instant case, and the Court refers to the decision of the Appellate Division of the Supreme Court of New York, which is here appealed from, and after carefully considering it reaches an opposite conclusion, and holds that the Act of October 6, 1917, purporting to amend the Judicial Code so as to save to claimants the rights and remedies under the Workmen's Compensation Law of any state, is unconstitutional, in that it violates Article III, Section 2, of the Constitution.

OPINION FILED AS SUPPLEMENTAL BRIEF

The opinion in full is as follows:

LENNON, *J.*:

"*Certiorari* to review the action of the Industrial Accident Commission in awarding death benefits to respondents Maria and Carmina Soarez. The deceased, Joe Soarez, died as the result of an accidental injury sustained by him while employed as a stevedore on the deck of petitioner's vessel which was at the time discharging a cargo of lumber at a San Francisco dock.

"The rights and liabilities of the parties in connection with the injury and death of Soarez were matters clearly within admiralty jurisdiction, and, prior to the amendment of the Judicial Code in 1917, the application of the California Workmen's Compensation Act would have been an unwarranted invasion of the admiralty jurisdiction of the federal courts. (*Southern Pacific Company vs. Jensen*, 244 U. S. 205.)

"At the time the decision in the Jensen case was rendered, sections 24 and 256 of the Judicial Code gave to the District Courts of the United States, "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction * * * saving to suitors in all cases, the rights of a common law remedy, where the common law is competent to give it." (36 *Stat. at L.* 1091, 1160, Chap. 231; *U. S. Comp. Stat.* 1916, Sections 991 (1), 1233.) By act of October 6, 1917, hereinafter referred to as "the amendment," Congress amended the Judicial Code to extend the saving clause to secure "to claimants the rights and remedies under the Workmen's Compensation Law of any state." (Act. Oct. 6, 1917, c. 97, 40 *Stat. at L.*, 395, Sec. 2; *Fed. Stat. Ann. Suppl.* 1918, pp. 401, 414; *U. S. Compiled Statutes Temporary Supplement* 1917, Sec. 991, p. 37, and Sec. 1233, p. 39.)

"Petitioner resists the application of the amendent in support of the award in the instant case upon the ground

that the said amendment is in conflict with Article III, Section 2, of the United States Constitution and therefore wholly void.

"Article III, Section 2, of the Constitution provides that the judicial power of the federal courts shall extend to all cases of admiralty and maritime jurisdiction. It is the theory of petitioner that the existing law of the sea was impliedly designated by this provision to furnish the rules by which the rights of litigants in maritime cases were to be determined. The correctness of this theory is not open to question. (*Benedict's Admiralty,* 4th Ed., Sec. 139; *Willoughby on the Constitution,* Chap. LV; *The Genessee Chief,* 12 How. 443; *The Lottawanna,* 21 Wall. 558; *Workman vs. New York,* 179 U. S. 552; *Southern Pacific Company vs. Jensen, supra.*) Nor is it open to serious question that the reason for this implied adoption of the existing law of the sea as the basis and groundwork of the maritime system of the nation was to withdraw the rules and limits of maritime law from the disposal and regulation of the several states, thereby securing that uniformity and consistency at which the constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other and with foreign nations. (*The Lottawanna, supra; Southern Pacific Company vs. Jensen, supra.*) Whether or not the amendment to the Judicial Code assumes to authorize under federal sanction the exercise of a power of disposal and regulation over the rules and limits of maritime law which would be fatal to that uniformity and consistency which it was one of the primary objects of the constitution to secure is the question now presented for our determination.

"On behalf of the respondents, the suggestion is made that the numerous decisions upholding the constitutionality of the old "saving to suitors" clause of the Judicial Code foreclose all discussion to the instant case for the reason

that the present amendment is merely an expansion of that clause. The difficulty with this reasoning lies in the fact that the original "saving clause" saved *remedies* only, whereas the amended clause saves not only remedies but *rights* as well. Under the original clause, the substantive law, wherever administered, was for maritime cases the law of the sea. (*Chelentis vs. Luchenbach S. S. Co.*, 247 U. S. 372.) The old "saving clause" did not, therefore, interfere with the uniform and harmonious operation of the maritime law, and consequently, it did not violate the constitution. It by no means follows, however, that the same may be said of the clause as expanded to save to claimants the rights and remedies under the workmen's compensation law of any state. By the statute as so amended, Congress has adopted as part of the substantive maritime law of the nation the rules governing liability in the case of industrial accidents contained in the workmen's compensation acts of the several maritime states. In general these acts, like that in force in this state, are exclusive in character; that is to say, where applicable at all, they furnish the *sole* basis for recovery in the case of industrial accidents. It follows that in states having this type of statute Congress has wholly abolished all liabilities under the general maritime law arising out of industrial accidents (*The Howell*, 257 Fed. 578.). The workmen's compensation acts in the various states are widely divergent in their terms. Moreover, if it be true, as it undoubtedly is, that the amendment must be interpreted prospectively, there is no visible limit to the possible future divergence between the terms of these laws. Finally, when it is considered that the courts have upheld clauses in the workmen's compensation acts giving to those statutes an extraterritorial effect, it is at once apparent that the rules adopted by Congress to govern the liabilities of the parties in the case of maritime

accidents cannot fail to present an aspect of "confusion worse confounded." The question in the instant case, therefore, is whether or not the divergence and confusion so created in the substantive law of the sea interferes with the proper harmony and uniformity of the maritime law in its international and interstate relations which it was the aim of the constitution to secure.

"The constitutionality of the amendment to the Judicial Code has been upheld in *Stewart vs. Knickerbocker Ice Co.*, 123 N. E. (N. Y.) 383. The reasoning upon which the decision in that case was based is stated as follows by the Court of Appeals of New York: "In view of the close division of opinion amongst the learned justices of the Supreme Court, involved in the decision of the Jensen case, and in view of the concession made in the prevailing opinion that it was difficult to determine just how far the jurisdiction of the federal courts in maritime matters might be limited or affected by such legislation, we think that we are justified in assuming that the Congress has acted within its powers under the constitution when, after due consideration, it has confided to the states the power to enact and enforce Workmen's Compensation Acts in respect of injuries received in the course of maritime employment. We think that it would be altogether an unjustifiable concession of lack of state jurisdiction in this field of compensation to injured workmen or their dependents, if, after this amendment by the Congress, we should hold that our statute was unconstitutional.

"This reasoning appears to us to be based upon a misconception of the Jensen case. It is true that in that case four justices dissented, but it is in the prevailing opinion that we must seek for a statement of the law as established by the decision of the Court. It is also true that that opinion concedes the difficulty of determining the exact extent

to which state legislation may limit or affect maritime rights and states that, considering the former opinions of the Court, it must now be accepted as settled doctrine that . . . ; . . . Congress has paramount power to fix and determine the maritime law which shall prevail through the country.' The Court did not seem to imply, however, that Congress in the exercise of this 'paramount power' or that the state legislature in the exercise of their somewhat indeterminate authority could destroy the uniformity of the maritime law which it was the aim of the constitution to secure. That the uniformity of the maritime law is guaranteed by the constitution itself is unequivocally stated and restated in the opinion of the Court. That such, indeed, was the fundamental basis of the prevailing opinion is clearly recognized in the opinions of the dissenting justices. Since, therefore, it has been determined that, whatever may be the power of Congress or of the state legislatures in maritime matters, the constitution itself guarantees the uniformity of the maritime law, we can see no escape from the necessity of considering whether or not the amendment to the Judicial Code destroys the uniformity so guaranteed.

"Respondents contend that by granting to Congress the power to regulate commerce with foreign nations, and among the several states and with the Indian tribes, the framers of the constitution evinced a purpose to secure consistency and uniformity of regulation identical with that evinced by extending the judicial power of the federal courts to all cases of admiralty and maritime jurisdiction. With this contention as a basis, respondents argue that the case of *Clark Distilling Co. vs. Western Maryland R. Co.*, 242 U. S. 311, which upholds the constitutionality of the Webb-Kenyon Act, is a conclusive authority in favor of the constitutionality of the enactment which we are now considering. The position of respondents in this behalf is

squarely sustained by the opinion of Judge Hand in *The Howell, supra.* The learned Judge held, in effect, that the Clark Distilling Co. case established the proposition that as to any matters over which Congress has jurisdiction, it may allow state legislation untrammeled until such time as in its own pleasure it may choose to assume explicit legislative control. While we have the utmost respect for the learning and ability of the author of that opinion, after mature deliberation we are constrained to disagree with his conclusion.

"In *Clark Distilling Co. vs. Western Maryland R. Co., supra,* the United States Supreme Court held that Congress had power to forbid 'the interstate shipment or transportation of intoxicating liquor which was intended by any person interested therein to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of the state into which the liquor is transported.' It was claimed 'that the act was not within the power given to Congress to regulate because it submitted liquors to the control of the states by subjecting interstate commerce in such liquors to present and future state prohibitions, and hence, in the nature of things was wanting in uniformity.' It is not, we think, open to serious question but that this claim would be sound as applied to any ordinary article of commerce, or, but that it would have prevailed with the court had liquor been regarded, as it once was, as an ordinary article of commerce. (*Bowman vs. C. & N. W. R. Co.,* 125 U. S. 465; *Vance vs. Vandercook Co.,* dissenting opinion, 170 U. S, 438, 457.) The United States Supreme Court has shown an unmistakable inclination to uphold restrictions upon traffic in liquor without openly declaring that liquor was not an ordinary article of commerce. In so doing, the court has resorted to applications of constitutional principles which

would not have been applied in like manner to uphold restrictions upon traffic in lumber or cotton which were similar in their scope and effect. (See *Willoughby on The Constitution,* Section 317, 321, inclusive.) This fact is recognized by the Chief Justice in the closing paragraph of the opinion in the Clark Distilling Co. case:

> 'Before concluding, we come to consider what we deem to be arguments of inconvenience which are relied upon; that is, the dread expressed that the power by regulation to allow state prohibitions to attach to the movement of intoxicants lays the basis for subjecting interstate commerce in all articles to state control, and therefore destroys the constitution. The want of force in the suggested inconvenience becomes patent by considering the principle which, after all, dominates and controls the question here presented, that is, the subject regulated and the extreme power to which that subject may be subjected. *The fact that regulations of liquor have been upheld in numerous instances which would have been repugnant to the great guarantees of the Constitution but for the enlarged right possessed by government to regulate liquor has never, that we are aware of, been taken as affording the basis for the thought that government might exert an enlarged power as to subjects to which, under the constitutional guaranties, such enlarged power could not be applied.* In other words, the exceptional nature of the subject here regulated is the basis upon which the exceptional power exerted must rest, and affords no ground for any fear that such power may be constitutionally extended to things which it may not, consistently with the guaranties of the Constitution, embrace.' (The italics are ours.)

"The difference between the character of the Webb-Kenyon Act and the amendment to the Judicial Code now

under consideration, as well as the difference between the subjects of which these two laws treat is manifest. The one deals with certain property the abuse of which is a menace to society. The other deals with ships (of whose vital importance to the welfare and even to the life of the nation the recent war furnishes a vivid reminder) and subjects them at once and the same time to the varying, and even conflicting, laws of the many states at whose ports they must call in the course of their necessary wanderings. As stated in *The Lottawanna, supra;* 'The general system of maritime law which was familiar to the lawyers and statesmen of the country when the constitution was adopted was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend "to all cases of admiralty and maritime jurisdiction" * * * One thing, however, is unquestionable; the constitution must have referred to a system of law co-extensive with, and operating uniformly in, the whole country.' There was no general system of liquor laws designed to be preserved by the constitution. Indeed the subject matters of the two enactments which respondents seek to link together are so vitally and patently different in nature, purpose, history and circumstance that we find it impossible to conceive that the question of the constitutionality of one is conclusively determined by the ruling on the constitutionality of the other. We therefore consider ourselves not only free but also under a manifest and unescapable duty to consider on its own merits the question as to whether or not the Judicial Code as amended in effect destroys the uniformity of the admiralty and maritime law, which, like the law merchant, is always national, even international, in character, and necessarily so to fulfill its mission.

"It is only in case the state workmen's compensation acts merely assume to regulate matters of a local nature

admitting of diversity of treatment according to local necessities that their adoption by Congress as part of the maritime law would not be destructive of that uniformity which it was the aim of the constitution to secure. (*Gibbons vs. Ogden*, 9 Wheat. 1; *Port Richmond Ferry vs. Hudson County*, 234 U. S. 317; *Wilmington Transportation Co. vs. Cal. R. R. Comm.*, 236 U. S. 151; *Wabash, etc. R. Co. vs. Illinois*, 118 U. S. 557.) That such, however, is not the nature and effect of the workmen's compensation acts has been conclusively determined by the United States Supreme Court in *Southern Pacific Co. vs. Jensen, supra.* In this behalf the Court said: 'If New York can subject foreign ships coming into her ports to such obligations as those imposed by her Compensation Statute, other states may do likewise. The necessary consequence would be destructive of the very uniformity in respect to maritime matters which the constitution was designed to establish; and the freedom of navigation between the states and with foreign countries would be seriously hampered and impeded. A far more serious injury would result to commerce than could have been inflicted by the Washington statute authorizing a materialman's lien, condemned in *The Roanoke.*' (189 U. S. 185). 'The legislature exceeded its authority in attempting to extend the statute under consideration to conditions like those here disclosed. *So applied, it conflicts with the constitution and to that extent is invalid.*' (The italics are ours.) After admitting that state legislation may to some extent change or modify the general maritime law and after refusing to attempt to define with exactness just how far such changes and modifications are valid, the Court continued: 'And plainly, we think, no such legislation is valid if it contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its interna-

tional and interstate relations. *This limitation, at least, is essential to the effective operation of the fundamental purpose for which such law was incorporated into our national laws by the Constitution itself.'* (The italics are ours.) The decision in the Jensen case was based, therefore, upon the conclusion that the Workmen's Compensation Act of New York, as applied to maritime accidents did work material prejudice to the characteristic features of the general maritime law and did interfere with the proper harmony and uniformity of that law in its relation to international and interstate relations.

"It is true that this language was used of the Workmen's Compensation Act of New York as applied to maritime accident *exproprio vigore*. But by no possible process of reasoning can it be asserted that that act, or any of the other varying and conflicting workmen's compensation acts of the several maritime states, can have the effect of destroying the uniformity of the general maritime law when their force is derived from the respective state legislatures, but that these identical acts have precisely the opposite effect when their force is derived from the act of Congress. If the Workmen's Compensation Act of New York, or of California, operating in the field of maritime accidents by the act of the State legislature would have the effect of inflicting upon commerce a far more serious injury than that which would have resulted from the Washington statute authorizing a material man's lien which was condemned in *The Roanoke, supra,* its effect in the same field can be no less injurious and no more consonant with the uniformity of regulation which it was the aim of the constitution to secure if its operation is extended to that field by the act of Congress. If the effect of the statute as enacted by the state legislature was to make its application to maritime accidents a violation of the constitution of the United States by reason of the fact that it destroyed the uniformity of the

law of the sea, such must of necessity be its effect when enacted by Congress, for the identical conflicts and inconsistencies are adopted and perpetuated.

"We, therefore, conclude that the amendment to the Judicial Code is unconstitutional in that it violates Article III, Section 2, of the constitution of the United States.

"The award is annulled.

LENNON, *J.*"

"We concur:
"SHAW, *J.*
"WILBUR, *J.*
"LAWLER, *J.*
"ANGELLOTTI, *C. J.*"

Respectfully submitted,
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Attorney for Plaintiff in Error

Office Supreme Court, U. S.
DEC 16 1919
JAMES D. MAHER,
CLERK.

IN THE

Supreme Court of the United States

December Term, 1919, No. 543.

KNICKERBOCKER ICE COMPANY,
Plaintiff in Error,

vs.

LILLIAN E. STEWART,
Defendant in Error.

Brief filed by permission of the Court on behalf of the Knickerbocker Ice Company, plaintiff in error by Mark Ash (as *amicus curiae*) representing the Newtown Creek Towing Company.

Introduction.

This brief is presented by counsel at the request of the Newtown Creek Towing Company, which is interested in the instant case before this court by reason of the following:

John McAllister, while in the employ of the Newtown Creek Towing Company, as a deckhand on its tugboat "Reliance" was on September 12th, 1918, while the vessel was navigating in the waters of Newtown Creek, which empties into the East River, New York, was missed from the vessel and on September 15th, 1918, the dead body was recovered from the waters of that creek.

Annie McAllister, the mother of the deceased, filed a claim for compensation with the New York State Industrial Commission on behalf of a daughter and three sons, as dependents of the deceased.

The Commission found that the deceased, while engaged in the regular course of his employment as a deckhand on the tug, owned and operated by his employer, the Newtown Creek Towing Company, was missed from the vessel and his body was later recovered on September 15th, 1918, from the waters of Newtown Creek.

At the hearing before the Commission, the Newtown Creek Towing Company, raised the objection, among others, that the Workmen's Compensation Law of New York was unconstitutional in violating Sec. 2 of Article 3 of the Federal Constitution, as applying to the claim before it, the deceased having met his death while engaged in maritime employment under a maritime contract, and that the amendments by Congress of Sections 24 and 256 of the U. S. Judicial Code were likewise in violation of the article of the Federal Constitution referred to.

Despite this objection, the Commission awarded to each of the brothers and sister of the deceased as dependents, $2.275 weekly until they respectively arrive at the age of eighteen years. If this award stands, the employer, Newtown Creek Towing Company, will be required to pay to these alleged dependents a total of $3,194.10.

An appeal was taken from this award of the Commission by the Newtown Creek Towing Company to the Appellate Division of the New York Supreme Court, Third Department, and there,

among others, the constitutional point referred to was raised and urged, but the Appellate Division declined to hear argument on the constitutional question and reserved decision until the decision of this court in the instant case.

As the decision in the instant case will determine the constitutional point pending before the Appellate Division in our case, the permission is asked to present this brief upon that single point.

Moreover, since the passage of the Act of Congress amending the Judicial Code, conflicting decisions have been rendered by the District Courts as to the effect of the amendment. In *The Howell* 257 Fed. 578, it was decided in the New York District that since the amendment, a person suffering injuries while engaged in maritime employment under a maritime contract, has no longer any rights under the general maritime law, as the New York law makes the remedy thereunder exclusive and Congress has validated that statute. On the other hand, in *Rohde* v. *Grant Smith Porter Co.*, 259 Fed. 304, in the Oregon District, it was held that notwithstanding the amendment by Congress, the Oregon Compensation Law is not exclusive and the rights of an employee seeking redress for injuries occurring on navigable waters, while he was at work on a vessel, must be measured by the maritime law, and this right cannot be barred, enlarged or taken away by state legislation.

FIRST POINT.

The Act of Congress of October 6, 1917, amending the U. S. Judicial Code, § 24 and 256, has not removed the unconstitutionality of the Workmen's Compensation Law, as declared by this Court in Southern Pacific Co. v. Jensen, 244 U. S. 205.

Inasmuch as this court is familiar with the *Jensen* case, it is not considered proper to quote from it *in extenso*, but simply to refer to such parts of it in connection with other authorities as bear upon our contention, that the unconstitutionality of the Workmen's Compensation Act still exists as to claims for injuries received by seamen engaged in the performance of a maritime contract—notwithstanding the Act of Congress of October 6, 1917, which amended the Judicial Code, §§ 24 and 256, giving exclusive jurisdiction to the Federal Courts of all cases of admiralty and maritime jurisdiction, so as to read:

> "saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it, *and to claimants the rights and remedies under the workmen's compensation law of any state.*"

Section 11 of the N. Y. Workmen's Compensation Law provides that the liability of an employer:—

> *"shall be exclusive and in place of any other liability whatsoever,* to such employee, his personal representatives, husband, parents,

dependents or next of kin, or anyone otherwise entitled to recover damages, *at common law or otherwise* on account of such injury or death."

This section was enacted in conformity with the constitutional amendment added in 1913 to the New York State Constitution (Article 1, Section 19) permitting the legislature to fix the right to compensation to be paid by an employer from injuries received in the course of his employment and to provide that "the right to such compensation and the remedy therefor *shall be exclusive of all other rights and remedies*", and the N. Y. Court of Appeals has decided that the remedy provided is exclusive, and an action can no longer be maintained under the New York Statute (Code sections 1902-1903), by an administratrix to recover damages for wrongful acts, causing death. (*Shanahan* vs. *Monarch Engineering Co.*, 219 N. Y. 459.)

If then the Act of Congress of October 6th, 1917, giving to claimants the rights and remedies under the workmen's compensation law of any State, gives an employee or his dependents in case of his death, the exclusive rights under the New York Workmen's Compensation Law, it necessarily follows that seamen, longshoremen, and others included in group 8, section 2 of this law, suffering injuries while engaged in maritime employment under a maritime contract, have no longer any rights under the general maritime law, and it has been so recently decided by one of the Federal judges sitting in admiralty in New York City. (*The Howell*, 257 Fed. 578.)

The result is that the Act of Congress of October 6, 1917, has destroyed that part of the judicial power exclusively conferred by article 3, section 2 of the Federal Constitution, which provides:

> "The judicial power extend * * * to all cases of admiralty and maritime jurisdiction."

What this judicial power means, was settled a long time ago.

> "The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted, was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend 'to all cases of admiralty and maritime jurisdiction.'" (*The Lottawanna*, 21 Wallace, 558.)

> "No State Law can enlarge it nor can an Act of Congress or rule of Court make it broader than the judicial power may determine it to be its true limits." (*The Lawrence*, 1 Black, 526-527.)

> "The question as to the true limits of maritime law and admiralty jurisdiction is, undoubtedly, as *Chief Justice* Taney intimates, exclusively a judicial question, and no state law or Act of Congress can make it broader, or (it may be added) narrower, than the judicial power may determine those limits to be." (*The Lottawanna*, 21 Wallace, 558.)

> "The judicial power, which among other things, extend to all cases of admiralty and maritime jurisdiction, was conferred upon the Federal Government by the Constitution, and Congress cannot enlarge it, not even to

suit the wants of commerce nor for the more convenient execution of its commercial negotiations." (*The Belfast*, 7 Wallace, 624.)

"If, then, it is the duty of Congress to vest the judicial power of the United States, *it is a duty to vest the whole judicial power.* The language, if imperative as to one part, is imperative as to all. If it were otherwise, this anomaly would exist, that Congress might successively refuse to vest the jurisdiction in any one class of cases enumerated in the constitution, and thereby defeat the jurisdiction as to all; for the constitution has not singled out any class on which Congress are bound to act in preference to others." (Story, J., in *Martin* vs. *Hunter's Lessee*, 1 Wheat. 304, at 330.)

The cases last cited are the leading authorities in this court, and it is unnecessary to refer to others to the same effect to show that the judicial power is to be determined by the Federal Courts themselves and is not to be limited by any Act of Congress.

In another view, the Act of Congress is unconstitutional for the reason that it has the effect of incorporating into the Federal Law, the New York Workmen's Compensation Law, a local law which does not operate uniformly throughout the whole country.

In the case of the *Lottawanna, supra* (21 Wallace, at p. 576), the Court further says:

"The Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to

> place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states."

In *Workman* vs. *New York City*, 179 U. S. 552, in an exhaustive opinion written by Mr. Justice (now Chief Justice) White, in considering whether the liability of a municipality for injuries done by one of its vessels to another, was to be determined by the common law or by the principles of admiralty—he used the following vigorous language (179 U. S., p. 558):

> "The practical destruction of a uniform maritime law which must arise from this premise is made manifest when it is considered that, if it be true that the principles of the general maritime law giving relief for every character of maritime tort where the wrongdoer is subject to the jurisdiction of admiralty courts can be overthrown by conflicting decisions of state courts, it would follow that there would be no general maritime law for the redress of wrongs, as such law would be necessarily one thing in one state and one in another; one thing in one port of the United States and a different thing in some other port. As the power to change state laws or state decisions rests with the state authorities by which such laws are enacted or decisions rendered, it would come to pass that the maritime law affording relief for wrongs done, instead of being general and ever abiding, would be purely local—would be one thing to-day and another thing to-morrow. That the confusion to result would amount

> to the abrogation of a uniform maritime law is at once patent. And the principle by which the maritime law would be thus in part practically destroyed would besides apply to other subjects specially confided by the Constitution to the federal government. Thus, if the local law may control the maritime law, it must also govern in the decision of cases arising under the patent, copyright, and commerce clauses of the Constitution."

and in 179 U. S., at page 561, Mr. Justice White quotes with approval the remarks of Mr. Justice Bradley in the *Lottawanna*, 21 Wallace 576, which we have above extracted.

In *The Chusan*, 2 Story 455 (5 Fed. Cas. 680), Story, J., said:

> "In the exercise of this admiralty and maritime jurisdiction, the courts of the United States are exclusively governed by the legislation of Congress, and, in the absence thereof, by the general principles of the maritime law. The states have no rights to prescribe the rules by which the courts of the United States shall act, nor the jurisprudence which they shall administer. If any other doctrine were established, it would amount to a complete surrender of the jurisdiction of the courts of the United States to the fluctuating policy and legislation of the states. If the latter have any right to prescribe any rule, they have a right to prescribe all rules to limit, control or bar suits in the national courts. Such a doctrine has never been supported, nor has it for a moment been supposed to exist, at least as far as I have any knowledge, either by any state court or national court within the whole Union. For

> myself, I can only say that, during the whole of my judicial life, I have never, up to the present hour, heard a single doubt breathed upon the subject."

This requirement of uniformity to effect changes in the general maritime law, was reiterated in the *Jensen case*, 244 U. S. 205:

> "If New York can subject foreign ships coming into her ports to such obligations as those imposed by her Compensation Statute, other states may do likewise. The necessary consequence would be destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish; and freedom of navigation between the states and with foreign countries would be seriously hampered and impeded. A far more serious injury would result to commerce than could have been inflicted by the Washington statute authorizing a materialman's lien, condemned in *The Roanoke*. The legislature exceeded its authority in attempting to extend the statute under consideration to conditions like those here disclosed. So applied, it conflicts with the Constitution and to that extent is invalid."

Furthermore, if the right given by the New York Compensation Statute is exclusive and this law has been validated by the Act of Congress of October 6th, 19917, amending the Judicial Code, Sections 24 and 256, then it necessarily follows that the right of a vessel owner to limit his liability under the Limited Liability Act of the United States has been taken away.

> "'The liability of the owner of any vessel • • • for any act, matter or thing, loss, dam-

> age, or forfeiture, done, occasioned, or incurred, without the privity, or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.'" *U. S. Revised Statutes*, Sec. 4283.

The Supreme Court Rule in Admiralty, LVI, governing the proceedings to be taken by the owner of a vessel for limitation of liability pursuant to the statute, provides:

> "In the proceedings aforesaid, the said owner or owners shall be at liberty to contest his or their liability, or the liability of said ship or vessel for said embezzlement, loss, destruction, damage, or injury (independently of the limitation of liability claimed under said act) * * *"

The federal law of limited liability is a part of the maritime law of this country, "and therefore it is co-extensive in its operation with the whole territorial domain of that law,"

Butler v. *S. S. Co.*, 130 U. S. 527, 555.

and this court has by its rules laid down the method whereby the owner of a vessel may not only secure a limitation upon his liability, but may also contest the existence of any liability, including of course liability for injuries to employees.

This right to limit liability is in accordance with the policy of this country to encourage investment in ships.

Southern Pacific Co. v. *Jensen*, 244 U. S. 206.

If then the New York Compensation Act giving an exclusive right has been sanctioned by the Act of Congress in question, then what becomes of that part of the maritime law of this country, which limits the liability of a vessel owner and moreover allows him to contest that liability? The two acts cannot stand together.

It is therefore respectfully submitted that the Act of Congress of October 6, 1917, violates Article 3 of Section 2 of the Federal Constitution, and therefore the constitutional invalidity of the Workmen's Compensation Law, as determined in the Jensen case, still remains.

MARK ASH,
Of Counsel for
Newtown Creek Towing Co.

Office Supreme Court, U. S.
FILED
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CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 543.

KNICKERBOCKER ICE COMPANY, PLAINTIFF-IN-ERROR,

vs.

LILLIAN E. STEWART, DEFENDANT-IN-ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

Brief Filed by Permission of the Court on Behalf of Lillian E. Stewart, Defendant-in-error, by Warren H. Pillsbury (as Amicus Curiæ), Representing the Industrial Accident Commission of the State of California, 525 Market Street, San Francisco, California.

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Introductory Statement.

This brief is presented by counsel at the request of the Industrial Accident Commission of the State of California. The instant case involves the constitutionality of an act of Congress (chapter 97, 40 Stat., 395, approved October 6,

1917). This act extends to maritime employees the protection of the Workmen's Compensation Acts of the different States by amending sections 24 and 256 of the Judicial Code to this effect. For brevity the act will be referred to in this brief as the "Johnson Amendment" after Senator Johnson, of California, who introduced and pressed it for passage.

In

Southern Pacific Company vs. Jensen, 244 U. S., 205,

decided in June, 1917, this court held, by a divided court, that State Workmen's Compensation acts could not constitutionally apply to maritime workers, because of conflict with the general maritime law. No act of Congress was there under consideration. The Johnson Amendment was soon after passed by Congress in the endeavor to obviate the constitutional points noted in the decision.

The California official and public interest in this matter arises from the fact that the application of the California Workmen's Compensation Act to maritime employments depends, equally with the New York act involved in the case at bar, upon the constitutionality of this act of Congress.

PART I.

PRELIMINARY CONSIDERATIONS AND OUTLINE OF ARGUMENT.

At the outset let it be said that the rule of *Southern Pacific Company vs. Jensen* is not here attacked. Much as counsel admires the reasoning contained in the dissenting opinions in the Jensen case, the present controversy does not call for any reconsideration of the issues there decided. The supremacy of Federal law in the maritime field, including the general (non-statutory) maritime law, in the absence of a definite declaration of Congress to the contrary, there estab-

lished, is not involved in the present question of the constitutional power of Congress.

I. Social and Economic Considerations.

Sound constitutional interpretation endeavors, wherever there is room for choice, to reach that result which will best secure the political, social, and economic interests of the nation.

The problem of relieving the consequences of industrial injuries is a local problem. This is just as true of maritime injuries as of injuries in any other employment. When a stevedore is injured, no part of the burden of supporting himself and his family and of furnishing necessary medical and hospital care falls upon national commerce. It falls entirely upon the community in which he resides, his relatives and friends, public and private charities, and local institutions. If he be permanently crippled, the burden of his care, either to provide vocational re-education where possible, or to maintain him in his crippled condition, falls upon the local community. If he be killed, his burial and the nurture and economic re-establishment of his dependents is a local problem solely.

Of the entire group of maritime workers, the attention of the court is called to the fact that only sailors are nomadic. The rest, longshoremen, stevedores, dock workers, pilots, tug and barge employees, and river and harbor boatmen are permanent residents of the community wherein they are employed. About the same proportion of these workers are married and have families living in the community as for non-maritime employments. The same is largely true of sailors in coastwise shipping. And even of the nomadic class, seamen in interstate and foreign commerce, a fair proportion will have families or at least a home in some State to which they will revert during periods of disability and consequent economic dependence. A State is *morally* en-

titled to charge maritime industry with the relief of this burden cast by it upon the community to the same extent that it charges other industries conducted within the State for the relief of such burden.

> "The police power is the power of the State coextensive with self-protection." *City of Chicago vs. Washingtonian Home of Chicago* (Ill.), 124 N. E., 416.

The law maritime, here referring to the present status of its rules and not to the extent of Federal jurisdiction under it, is archaic, inadequate, and unjust in the extreme to maritime workers. Its rules are on a par with the damage suit and negligence method of redressing injuries sustained by shore employees in the course of their employment, a method now abandoned by forty-two of our States and three Territories in favor of compensation acts. Our Federal Government has also adopted the compensation system for its civilian employees. It previously had this system in substance for many years in its military and naval service in granting pensions against disablement sustained "in line of duty." In England and the British Colonies compensation acts have long since superseded negligence statutes.

Comparing the present status of maritime law with typical workmen's compensation acts:

(1) For *fatol injuries*, tortious or accidental, admiralty gives no relief whatever, apart from State statutes. The California Compensation Act, a typical statute, on the other hand, allows a burial benefit of $100, a death benefit to a widow or other total dependent of thrice the annual earnings, or a death benefit to a parent or other partial dependent of thrice the annual contribution made for the support of such dependent by the employee.

(2) For *non-fatal accidental injuries,* admiralty allows nothing except maintenance, care, and wages to the end of the voyage for sailors. (*The Osceola,* 189 U. S., 158.) For stevedores, longshoremen and other dock workers, nothing at all is given. (*Georgia Casualty Co. vs. American Milling Co.* (Wisc.), 172 N. W., 148.) For boatmen and deck-hands on interior waterways, wages and maintenance to the end of the voyage is infinitesimal, and it is doubtful whether there is any liability for medical and hospital care. Compensation acts, on the other hand, allow for such injuries, medical and hospital care and in addition 50 to 66 per cent of wages weekly during the temporary disability to provide needed support for the disabled employee or his family, as a substitute for the wages in abeyance during idleness.

(3) For *accidental permanent injuries,* such as the loss of an eye or a hand, the law maritime allows only maintenance, wages and care to the end of the voyage for sailors, nothing for stevedores or longshoremen, and substantially nothing for seamen in local commerce. Compensation acts allow a percentage of wages for a period of time fixed by schedule, to enable the employee to re-educate and rehabilitate himself so that he will, if possible, be restored to society as a useful working member. If economic restoration of the injured employee be impossible because of severity of the injury, such compensation acts allow by schedule a larger amount to partially or wholly relieve the community from the burden of supporting the employee for the remainder of his life. The law maritime undertakes no economic rehabilitation of an accidentally crippled employee. That this is entirely wrong and unjust is obvious from the elaborate care now being taken by the Federal Government of its crippled soldiers, giving them vocational education and rehabilitation. Justice requires that the crippled of industry be given the same care as the crippled of war, and this State compensation acts endeavor to accomplish.

(4) For *tortious non-fatal injuries,* admiralty allows to a limited extent recovery of full damages, but only by judicial adoption of common-law rules. Recovery is governed by the rule of divided damages for comparative negligence. Under *The Osceola,* even this is limited to recovery if the injury is due to unseaworthiness of the ship or failure to supply or keep in order proper appliances; if the injury be due to the negligence of the master or of fellow-servants, recovery is denied. Compensation acts allow the same recovery for tortious as for accidental injuries, based mainly upon extent of impairment of earning capacity.

(5) For the enforcement of rights given by maritime law only a damage suit is provided, necessarily long in duration, expensive in maintenance, and full of hazards of litigation. The amount recovered may frequently be excessive as to the employer, and invariably a large share of the amount recovered goes into costs of litigation and attorney's fees, instead of to the sufferer. Claimants being poor, litigation is frequently financed by attorneys as a matter of charity or speculation, amounting to a burden or degradation respectively to the legal profession. Against this, most compensation acts provide a speedy and inexpensive trial before an administrative tribunal without a jury, with informal procedure. Litigation is speedy, inexpensive, and non-technical. The recovery against the employer is sharply limited in amount and almost the entire amount recovered goes to the employee without diversion to expense of litigation. The amount recovered is received by the employee while there is yet time for him to use it for support during his period of disablement, instead of being recovered in a lump sum years after the economic crisis has passed.

The legislative declaration of superiority of the compensation system over the negligence and damage suit system of redressing industrial injuries has been judicially sanctioned

on many occasions, the following brief extracts being given by way of illustration:

> "Of course we cannot ignore the question whether the new arrangement is arbitrary and unreasonable, from the standpoint of natural justice. Respecting this, it is important to be observed that the act applies only to disabling or fatal personal injuries received in the course of hazardous employment in gainful occupation. Reduced to its elements, the situation to be dealt with is this: Employer and employee, by mutual consent, engage in a common operation intended to be advantageous to both; the employee is to contribute his personal services and for these is to receive wages, and ordinarily, nothing more; the employer is to furnish plant, facilities, organization, capital, credit, is to control and manage the operation, paying the wages and other expenses, disposing of the product at such prices as he can obtain, taking all the profits, if any there be, and, of necessity, bearing the entire losses. In the nature of things, there is more or less of a probability that the employee may lose his life through some accidental injury arising out of the employment, leaving his widow or children deprived of their natural support; or that he may sustain an injury not mortal, but resulting in his total or partial disablement, temporary or permanent, with corresponding impairment of earning capacity. The physical suffering must be borne by the employee alone; the laws of nature prevent this from being evaded or shifted to another and the statute makes no attempt to afford an equivalent in compensation. But, besides, there is the loss of earning power—a loss of that which stands to the employee as his capital in trade. There is a loss arising out of the business, and, however it may be charged up, is an expense of the operation, as truly as the cost of repairing broken machinery or any other expense that ordinarily is paid by the employer. Who is to bear the charge? It is plain that, on grounds of natural justice, it is not unreasonable for the State, while relieving the employer from responsibility for damages measured by common-law standards and

payable in cases where he or those for whose conduct he is answerable are found to be at fault, to require him to contribute a reasonable amount, and according to a reasonable and definite scale, by way of compensation for the loss of earning power incurred in the common enterprise, irrespective of the question of negligence, instead of leaving the entire loss to rest where it may chance to fall—that is, upon the injured employee or his dependents. Nor can it be deemed arbitrary and unreasonable, from the standpoint of the employee's interest, to supplant a system under which he assumed the entire risk of injury in ordinary cases and in others had a right to recover an amount more or less speculative upon proving facts of negligence that often were difficult to prove and substitute a system under which, in all ordinary cases of accidental injury, he is sure of a definite and easily ascertained compensation, not being obliged to assume the entire loss in any case, but in all cases assuming any loss beyond the prescribed scale." *New York Central Railroad Company vs. White,* 243 U. S., 188.

"It seems to us that the considerations to which we have adverted in New York C. R. Co. *vs.* White, *supra,* as showing that the Workmen's Compensation Law of New York is not to be deemed arbitrary and unreasonable from the standpoint of natural justice, are sufficient to support the State of Washington in concluding that the matter of compensation for accidental injuries with resulting loss of life or earning capacity of men employed in hazardous occupations is of sufficient public moment to justify making the entire matter of compensation a public concern, to be administered through State agencies. Certainly the operation of industrial establishments that, in the ordinary course of things, frequently and inevitably produce disabling or mortal injuries to the human beings employed, is not a matter of wholly private concern. It hardly would be questioned that the State might expend public moneys to provide hospital treatment, artificial limbs, or other like aid to persons injured in industry, and homes or support for the

widows and orphans of those killed. Does direct compensation stand on a less secure ground? A familiar exercise of State power is the grant of pensions to disabled soldiers and to the widows and dependents of those killed in war. Such legislation usually is justified as fulfilling a moral obligation, or as tending to encourage the performance of the public duty of defense. But is the State powerless to compensate, with pensions or otherwise, those who are disabled or the dependents of those whose lives are lost, in the industrial occupations that are so necessary to develop the resources and add to the wealth and prosperity of the State? A machine as well as a bullet may produce a wound, and the disabling effect may be the same. In a recent case the Supreme Court of Washington said: 'Under our statutes the workman is the soldier of organized industry, accepting a kind of pension in exchange for absolute insurance on his master's premises.' Stertz *vs.* Industrial Ins. Commission, 91 Wash., 588; 158 Pac., 256, 263. It is said that the compensation or pension under this law is not confined to those who are left without means of support. This is true. But is the State powerless to succor the wounded except they be reduced to the last extremity? Is it debarred from compensating an injured man until his own resources are first exhausted? This would be to discriminate against the thrifty and in favor of the improvident. The power and discretion of the State are not thus circumscribed by the 14th Amendment." *Mountain Timber Company vs. State of Washington*, 243 U. S., 219.

To secure compensation insurance benefits to maritime workers, Congress had in 1917 and still has the choice of enacting a uniform national compensation act or of permitting the State compensation acts to apply either for the time being or indefinitely. The question of which of these courses to adopt is a legislative one, depending upon varying political and economic considerations. So long as either course is constitutional, the question of which to adopt is one solely

within the power of Congress. A few of the arguments in favor of relinquishing the matter to the States, as Congress has done, are:

1. *Local Burden.* The burden cast by industrial injury in the maritime field is primarily a local affair, justifying the granting of power to the States to protect themselves against loss on account thereof. This has been discussed above.

2. *Necessity for Quick Action.* The Jensen case, decided in June, 1917, left dock workers, stevedores, and other maritime workers without the protection of compensation benefits to which they had previously been accustomed. The time was one of feverish activity incident to the war and increased demands upon transportation by land and sea. Accidents were more numerous because of the rush of such work. Admiralty law gave no protection to maritime workers comparable with the benefits of State compensation acts. The great mass of workmen in the same community in nonmaritime occupations were enjoying the protection denied to stevedores and dock workers, causing intense dissatisfaction among the latter. Labor troubles were acute and waterfront strikes threatening. With a discontented labor force (justly with respect to the demand for compensation protection), and tendencies toward labor troubles, there was danger that transportation service would be hampered at a critical time. It was therefore wise for the Government to respond speedily to the insistent demands of maritime workers for compensation protection of some sort. As it would take months or years to get a complete national compensation system through Congress and get an efficient administration of it to working, and as the maritime States already had such laws with proper machinery in full operation, the reestablishment of State compensation acts was clearly the best means of meeting the emergency.

3. *Existing Laws and Organization at Hand.* As above pointed out, the maritime States were at that time fully

equipped as to laws and administrative machinery to take over the work without a moment's delay.

4. *Uniformity.* The advantage of compensating stevedores, dock workers, and river and harbor boatmen, according to the law of the State in which they had their residence and employment, upon the same basis and before the same tribunals as of other workers in the same State, is worthy of consideration. Uniformity of relief among industrial workers makes for greater labor contentment and efficiency of production. The avoidance of dual tribunals, in which a claimant may frequently find he has sued in the wrong tribunal, whichever one he chooses, is very necessary.

II. Brief of the Argument.

The text of the act of Congress under attack will be found in Appendix A of this brief. The construction of this act by the Senate Judiciary Committee in its report submitting the bill will be found in Appendix B.

The act of Congress here under consideration specifically saves both *rights* and *remedies* under the State compensation acts. Constitutional questions are therefore presented under two heads:

(*a*) *Judicial, i. e.,* whether any conflict is created between the judicial power of the States and the judicial power of the United States in respect to maritime injuries.

(*b*) *Legislative, i. e.,* whether any conflict is created between the legislative power of the States and the legislative power of the United States in respect to maritime injuries.

A. *No unconstitutional interference is created by the Johnson Amendment between the judicial power of the States and of the United States.*

By article 3, section 2 of the Federal Constitution the power of the United States is extended to "all cases of admiralty and maritime jurisdiction." This grant is a simple investiture, permitting concurrent jurisdiction of the State courts unless Congress expressly or impliedly makes the Federal jurisdiction exclusive.

Congress may *a fortiori* expressly permit the States to exercise concurrent judicial jurisdiction. This is proved by the unchallenged existence of the older "saving clause," sections 24, 256 Judicial Code, for one hundred and thirty years, which permits exactly this thing.

Practically every judicial power granted by Article III, section 2, with the exception of impeachments of Federal officers, made exclusive by Article I, section 3, subdivision 6, is capable of concurrent exercise by State courts unless Congress prescribes otherwise. For instance, questions arising under the Constitution, laws and treaties of the United States can and are determined in State courts, with a right of review in the United States Supreme Court. Ambassadors, ministers and consuls may institute proceedings in State or Federal courts. The United States and the States may institute proceedings under their corporate powers in State courts if they desire. Cases involving diversity of citizenship may be tried in either forum.

Moreover, in view of the recent decision in *The Howell*, 257 Fed., 578, further discussed *infra*, it is proper to observe that Congress may, if it chooses, decline to exercise a portion of the judicial power of the United States, leaving the State court the exclusive forum for the time being. Under the power given it to constitute tribunals inferior to a Supreme Court, Congress may omit to constitute a Federal court having jurisdiction over certain matters. For instance, it has been established that it may limit jurisdiction of the Federal courts under diversity of citizenship to cases involving more than $2,000, although the Constitution vests judicial power

in the United States for diversity of citizenship without regard to amount.

Holt vs. Indiana Mfg. Co., 176 U. S., 68.
United States vs. Hayward, 160 U. S., 493, at 498.
Fishback vs. Western Union Telegraph Co., 161 U. S., 96.

Similarly, Congress may omit to confer jurisdiction over certain maritime transactions upon the Federal courts.

Congress may reach the same result in another way. It may repeal or alter the maritime substantive law so that there would no longer be a right of action under the maritime law for maritime injuries. (*The Howell,* 257 Fed., 578.) In such case there is no right to be asserted under the law maritime and no infringement of Article III, section 2 would exist if injuries of maritime employees were triable solely in State courts under State law.

Congress may therefore authorize the exercise of concurrent judicial powers by the States with respect to maritime injuries.

B. *No unconstitutional interference is created by the Johnson Amendment between the legislative power of the States and of the United States.*

The same holds true of Article I, section 8, of the Constitution as of Article III, section 2. The grant of power to the United States, with a few minor exceptions, is a simple investiture and does not make mandatory its exclusive exercise by the United States. A study of Article I of the Constitution shows that certain powers are expressly prohibited to the States (Art. I, sec. 10, subd. 1). Others are permitted to the States with the express consent of Congress (Art. I, sec. 10, subds. 2 and 3). Of the remainder (Art. I, sec. 8), a few deal with matters of organization and internal functioning of the Federal Government as a sovereignty, and on

recognized principles of sovereignty could be exercised only by it. These are (1) to borrow money on the credit of the United States, (2) to constitute tribunals inferior to the Supreme Court, (3) to exercise exclusive jurisdiction over the District of Columbia.

The remainder of the powers conferred by Article I, sec. 8 have to do with the power to make or alter substantive private law, and undoubtedly are capable of concurrent exercise by the States with the consent, or in the absence of implied objection, of the United States. For instance, under the power to regulate commerce the States, until the enactment of the Federal Employees' Liability Act, supplied the entire body of law relating to injuries sustained by employees of railroads while engaged in interstate commerce. Similarly, under the bankruptcy clause, States may enact laws where not in conflict with an act of Congress.

Sturges vs. Crowninshield, 4 Wheaton, 122.

The power of Congress to legislate upon admiralty and maritime subjects is derived by implication from the grant of judicial power to the United States in this matter (Art. III, sec. 2) and also from Article I, section 8, subdivision 18, which confers power upon Congress "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof." *Southern Pacific Company vs. Jensen, supra.*

That this power is susceptible of concurrent exercise by the States, at least with the express consent of Congress, is established by the following, here submitted in outline only and presented more fully below:

1. Authorities sanctioning State legislation in the maritime field, which can be explained only upon the theory that the States may be given power to legislate in this field.

2. The unchallenged existence of the saving clause for one hundred thirty years, by which clause Congress permits certain State legislation in maritime matters.

3. The decision of this court in *Southern Pacific Co. vs. Jensen,* by its discussion of the "saving clause," and its elaboration of the rule that in matters involving necessity for uniformity "the inaction of Congress is deemed equivalent to its declaration that commerce in that matter shall be free," recognizes the power of Congress to affirmatively, in whole or in part, relinquish portions of the field to the States.

4. The decision of this court in *The Lottawanna,* 21 Wall., 558, establishes the power of Congress to legislate on seaman's rights under the commerce clause, and also establishes the right of the States to legislate in such matters until Congress shall indicate otherwise.

5. The close parallel between the power to legislate under the commerce clause concerning injuries sustained by employees in interstate commerce, and under the implied grant of power over maritime law to legislate concerning injuries sustained by employees in maritime employments, is directly in point. If the States may exercise such power for interstate injuries under the silence of Congress, they can exercise similar power over maritime injuries with the express assent of Congress.

6. The close parallel between the Johnson Amendment and the Wilson and Webb-Kenyon Acts, relinquishing to the State a portion of the Federal legislative field, is directly in point. The latter having been held constitutional, the former must be.

7. Finally, the burden cast by industrial injuries, whether maritime or non-maritime, is a local burden and the redress

of such injuries is within the police power of the States. *New York Central Railroad Co. vs. White,* 243 U. S., 188. The State can therefore legislate upon the subject in its own right, subject only to the barrier of Federal occupation of all or a portion of the field, which barrier Congress may let down.

C. *Neither the New York Act nor the Johnson Amendment violate the commerce clause* (Art. 1, sec. 8, subd. 3).

Plaintiff in error claims in his assignment of errors and brief, but makes no effort to prove, that the award in the present case is barred by the commerce clause. A moment's reflection shows that this claim is unsound.

1. Under the commerce clause the States have had full authority to legislate concerning injuries sustained by employees in interstate commerce (typically railroad employees) until Congress acts. *The Lottawanna,* 121 Wall., 558. The enactment of the Federal Employers' Liability Act excludes State legislation to the extent that such act governs, but no more. *New York Central Railroad vs. Winfield,* 244 U. S., 147. Until the passage of the Federal law, State legislation in the field was of unquestioned validity.

2. Congress has never acted under the commerce clause or otherwise for injuries in interstate commerce by water, the Federal Employers' Liability Act being limited to employees of carriers by rail.

3. Congress has power to return to the State jurisdiction over a portion of interstate commerce otherwise exclusively Federal.

In re Rahrer, 140 U. S., 545.

Clark Distilling Co. vs. Western Md. R. Co., 242 U. S., 311.

The Lottawanna, 21 Wall., 558.

4. The deceased employee in the case at bar was not engaged in interstate or foreign commerce of any sort. Plaintiff in error, not being affected, is therefore not privileged to raise the point.

D. *The award of compensation benefits in the persent case is sustainable, without regard to the Johnson Amendment, by the following special constitutional considerations of limited application:*

1. The present case is one of fatal injury. The law maritime makes no provision for fatal injuries, which are redressed only by State statutes. The law maritime being silent, State compensation acts for fatal injuries do not conflict with the law maritime.

2. The present case is one of an injury occurring upon the wharf or dock. The test of admiralty jurisdiction in tort is locality, and a tort occurring upon the dock is non-maritime. Therefore, State compensation acts can regulate it without conflicting with the law maritime.

To clear the present case of possible adventitious factors, it is respectfully pointed out:

1. No question is here presented of injuries occurring outside of the territorial limits of the State.

2. The deceased employee in the present case was not engaged in interstate or foreign commerce. He was engaged solely in intrastate commerce, in transporting ice from upper New York to New York City.

3. No question is here presented of attempt by a State to encroach upon modes of relief peculiarly appropriate to tribunals enforcing the law maritime, such as a libel *in rem* to enforce a maritime lien. The procedure below was strictly *in personam*.

PART II.

POINTS AND AUTHORITIES.

I. No Unconstitutional Interference is Created by the Johnson Amendment Between the Judicial Powers of the National Government and of the States.

But little more need be said in support of this proposition. We desire to call the attention of the court, however, to the following:

A. The existence of the "saving clause" in sections 24 and 256 of the Judicial Code and in the corresponding sections of the prior Judiciary Act, regarded as constitutional for over one hundred years, is conclusive proof of the power of Congress to permit a concurrent judicial power in the State in maritime matters, in a field in which Congress may exclude the State entirely if it so desires.

B. The grant of exclusive jurisdiction to the Federal courts in maritime matters is statutory, not constitutional.

The only authoritative reference to exclusive jurisdiction in maritime matters is found in section 9 of the Judiciary Act of 1789 and its successors in later statutes vesting *exclusive* jurisdiction in such cases in the United States courts, but *saving* the concurrent jurisdiction of the State courts.

Because of the many years of operation under the Judiciary Act, the fact is sometimes lost sight of that the source of *exclusive* jurisdiction in the Federal courts is the Judiciary Act and not the Constitution. The latter merely permits Congress to make such jurisdiction exclusive, if it so desires.

C. *Authorities:*

In *United States vs. Union Pacific Railroad Co.*, 98 U. S., 569, at 603,

this court stated:

> "We say, however, that with the exception of the Supreme Court, the authority of Congress, in creating courts and conferring on them all or much or little of the judicial power of the United States is unlimited by the Constitution."

In

Cooley, General Principles of Constitutional Law, 3rd ed., p. 124,

the following appears:

> "But although the Constitution extends the power to the cases specified (Const. Art. III, sec. 2), it does not make complete provision for its exercise, except in the few cases of which the Supreme Court is authorized to take original cognizance. For other cases it is necessary that courts shall be created by Congress and their respective jurisdictions defined; and in creating them, Congress may confer upon each so much of the judicial power of the United States as to its wisdom shall seem proper and suitable, and may restrict that which is conferred at discretion. In doing so, it may apportion among the several Federal courts all the judicial power of the United States, or it may apportion a part only, and in that case what is not apportioned will be left to be exercised by the courts of the States. Thus the States may have a limited jurisdiction within the sphere of the judicial power of the United States, but subject to be further limited or wholly taken away by subsequent Federal legislation. (Citing *Robertson vs. Cease,* 97 U. S., 646; *Godfrey vs. Terry,* 97 U. S., 171.) Such is the state of the law at this time: many cases within the judicial power of the United States are left wholly to the State courts, while in many others the State

> courts are permitted to exercise a jurisdiction concurrent with that of the Federal courts, but with a final review of the judgments on questions of Federal law in the United States Supreme Court."

II. No Conflict is Created Between the Legislative Power of the United States and of the States with Respect to Maritime Injuries.

This proposition goes to the root of the entire question. If it be sound, the act of Congress under consideration is constitutional, for no other consideration can affect the issue. No question of delegation of legislative power can be raised, for Congress is not authorizing State legislatures to enact Federal law; it is, instead, widening a field of State activity in which the State acts in its own right, not in right of Congress. State compensation acts derive their constitutional authority from and are referable to the police power of the States. *New York Central Railroad vs. White, supra.*

Similarly, if this proposition be correct, the doctrine of uniformity of maritime law (if uniformity of application be required of an act of Congress) becomes unimportant. Excellent as the doctrine of uniformity may be, as laid down in Southern Pacific Co. *vs.* Jensen, with reference to the general maritime law to secure it against interference from unauthorized State statutes, the moment the Federal Government permits the States to enter the field of maritime injuries, it necessarily follows that each State will enter with its own laws.

That our main proposition is correct and that the field at maritime injuries is one susceptible of the exercise of concurrent legislative power by the States, with the consent of Congress, is established by the following authorities and quotations therefrom:

> "Article 3, § 2, of the Constitution, extends the judicial power of the United States 'to all cases of admiralty and maritime jurisdiction;' and article 1,

§ 8, confers upon the Congress power 'to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States or in any department or office thereof.' Considering our former opinions, it must now be accepted as settled doctrine that, in consequence of these provisions, Congress has *paramount power to fix and determine the maritime law* which shall prevail throughout the country. *Butler vs. Boston & S. S. Co.*, 130 U. S., 527; 32 L. Ed., 1017; 9 Sup. Ct. Rep., 612; *Re Garnett*, 141 U. S., 1, 14; 35 L. Ed., 631, 634; 11 Sup. Ct. Rep., 840." "And further, that *in the absence of some controlling statute*, the general maritime law, as accepted by the Federal courts, constitutes part of our national law, applicable to matters within the admiralty and maritime jurisdiction. *The Lottawanna* (*Rodd vs. Heartt*), 21 Wall., 558; 22 L. Ed., 654; *Butler vs. Boston & S. S. Co.*, 130 U. S., 527, 557; 32 L. Ed., 1017, 1024; 9 Sup. Ct. Rep., 612; *Workman vs. New York*, 179 U. S., 552; 45 L. Ed., 314; 21 Sup. Ct. Rep., 212." * * *

"By § 9, Judiciary Act of 1789 (1 Stat. at L., 76, 77, chap. 20), the district courts of the United States were given *'exclusive* original cognizance of all civil causes of admiralty and maritime jurisdiction, * * * *saving to suitors, in all cases, the right of a common-law remedy*, where the common law is competent to give it.' And this grant has been continued. Judicial Code, § § 24 and 256 (36 Stat. at L., 1091, 1160, chap. 231, Comp. Stat., 1916 § § 991 (1), 1233).

"In view of these constitutional provisions and the Federal act, it would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified, or affected by State legislation. *That this may be done to some extent cannot be denied.* A lien upon a vessel for repairs in her own port may be given by State statute. (*The Lottawanna* (*Rodd vs. Heartt*), 21 Wall., 558, 579, 580; 22 L. Ed., 654, 663, 664; *The J. E. Rumbell*, 148 U. S., 1; 37 L. Ed., 345; 13 Sup. Ct. Rep., 498); pilotage fees fixed (*Cooley vs. Port Wardens*, 12 How.,

299; 13 L. Ed., 996; *Ex parte McNeil*, 13 Wall., 236, 242; 20 L. Ed., 624, 626); and the right given to recover in death cases (*The Hamilton (Old Dominion S. S. Co. vs. Gilmore)*, 207 U. S., 398; 52 L. Ed., 264; 28 Sup. Ct. Rep., 133; *La Bourgogne (Deslions vs. La Compagnie Generale Transatlantique)*, 210 U. S., 95, 138; 52 L. Ed., 973, 993; 28 Sup. Ct. Rep., 664). *See The City of Norwalk*, 55 Fed., 98, 106. Equally well established is the rule that State statutes may not contravene an applicable act of Congress or affect the general maritime law beyond certain limits. They cannot authorize proceedings *in rem* according to the course in admiralty (*The Moses Taylor*, 4 Wall., 411; 18 L. Ed., 397; *American S. B. Co. vs. Chase*, 16 Wall., 522, 534; 21 L. Ed., 369, 372; *The Glide*, 167 U. S., 606; 42 L. Ed., 296; 17 Sup. Ct. Rep., 930); nor create liens for materials used in repairing a foreign ship (*The Roanoke*, 189 U. S., 185; 47 L. Ed., 770; 23 Sup. Ct. Rep., 491). See *Workman vs. New York*, 179 U. S., 552; 45 L. Ed., 314; 21 Sup. Ct. Rep., 212. And plainly, we think, no such legislation is valid if it contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of the *general maritime law*, or interferes with the proper harmony and uniformity of *that* law in *its* international and interstate relations. This limitation, at the least, is essential to the effective operation of the fundamental purposes for which *such law* was incorporated into our *national laws* by the Constitution itself. These purposes are forcefully indicated in the foregoing quotations from *The Lottawanna*." *Southern Pacific vs. Jensen*, majority opinion (Italics ours).

"There is no doubt that the saving to suitors of the right of a common-law remedy leaves open the common-law jurisdiction of the State courts, and leaves some power of legislation, at least, to the States. For the latter I need do no more than refer to State pilotage statutes, and to liens created by State laws in aid of maritime contracts. Nearer to the point, it is decided that a statutory remedy for causing death may be enforced by the State courts, although the death

was due to a collision upon the high seas. *American S. B. Co. vs. Chase*, 16 Wall., 522; 21 L. Ed., 369; *Sherlock vs. Alling*, 93 U. S., 99, 104; 23 L. Ed., 819, 820; *Knapp, S. & Co. vs. McCaffrey*, 177 U. S., 638, 646; 44 L. Ed., 921, 925; 20 Sup. Ct. Rep., 824; *Minnesota Rate Cases (Simpson vs. Sheppard)*, 230 U. S., 352, 409; 57 L. Ed., 1511, 1545; 48 L. R. A. (N. S.), 1151; 33 Sup. Ct. Rep., 729; Ann. Cas. 1916 A, 18." *Southern Pacific Co. vs. Jensen*, dissenting opinion of Justice Holmes.

"In the very realm of navigation, the authority of the States to establish regulations effective within their own borders, in the absence of exclusive legislation by Congress, has been recognized from the beginning of our government under the Constitution. As to pilotage regulations, it was recognized by the first Congress (Act of August 7, 1789, chap. 9, § 4, 1 Stat. at L., 53, 54; Rev. Stat., § 4235; Comp. Stat., 1916, § 7981), and this court, in many decisions, has sustained local regulations of that character (*Cooley vs. Port Wardens*, 12 How., 299, 320; 13 L. Ed., 996, 1005; *Pacific Mail S. S. Co. vs. Joliffe*, 2 Wall., 450, 459; 17 L. Ed., 805, 807; *Ex parte McNiel*, 13 Wall., 236, 241; 20 L. Ed., 624, 626; *Wilson vs. McNamee*, 102 U. S., 572; 26 L. Ed., 234; *Olsen vs. Smith*, 195 U. S., 332, 341; 49 L. Ed., 224, 229; 25 Sup. Ct. Rep., 52; *Anderson vs. Pacific Coast S. S. Co.*, 225 U. S., 187, 195; 56 L. Ed., 1047, 1051; 32 Sup. Ct. Rep., 625)."

"It is settled that a State, in the absence of conflicting legislation by Congress, may construct dams and bridges across navigable streams within its limits, notwithstanding an interference with accustomed navigation may result. *Wilson vs. Black Bird Creek Marsh Co.*, 2 Pet., 245, 252; 7 L. Ed., 412, 414; *Gilman vs. Philadelphia*, 3 Wall., 713; 18 L. Ed., 96; *Pound vs. Turck*, 95 U. S., 459; 24 L. Ed., 525; *Escanaba & L. M. Transp. Co. vs. Chicago*, 107 U. S., 678, 683; 27 L. Ed., 442, 445; 2 Sup. Ct. Rep., 185; *Cardwell vs. American River Bridge Co.*, 113 U. S., 205, 208; 28 L. Ed., 959, 960; 5 Sup. Ct. Rep., 423; *Hamilton vs. Vicksburg, S. & P. R. Co.*, 119 U. S.,

280; 30 L. Ed., 393; 7 Sup. Ct. Rep., 206; *Willamette Iron Bridge Co. vs. Hatch*, 125 U. S., 1, 8; 31 L. Ed., 629, 631; 8 Sup. Ct. Rep., 811; *Lake Shore & M. S. R. Co. vs. Ohio*, 165 U. S., 365; 41 L. Ed., 747; 17 Sup. Ct. Rep., 357; *Manigault vs. Springs*, 199 U. S., 473, 478; 50 L. Ed., 274, 277; 26 Sup. Ct. Rep., 127."

"So, as to harbor improvements (*Mobile County vs. Kimball*, 102 U. S., 691, 697; 26 L. Ed., 238, 239); improvements and obstructions to navigation (*Huse vs. Glover*, 119 U. S., 543, 548; 30 L. Ed., 487, 490; 7 Sup. Ct. Rep., 313; *Leovy vs. United States*, 177 U. S., 621, 625; 44 L. Ed., 914, 916; 20 Sup. Ct. Rep., 797; *Cummings vs. Chicago*, 188 U. S., 410, 427; 47 L. Ed., 525, 530; 23 Sup. Ct. Rep., 472); inspection and quarantine laws (Gibbons *vs.* Ogden, 9 Wheat., 1, 203; 6 L. Ed., 23, 71); wharfage charges (*Keokuk Northern Line Packet Co. vs. Keokuk*, 95 U. S., 80; 24 L. Ed., 377; *Cincinnati, P. B. S. & P. Packet Co. vs. Cattlesburg*, 105 U. S., 559, 563; 26 L. Ed., 1169, 1171; *Parkersburg & O. River Transp. Co. vs. Parkersburg*, 107 U. S., 691, 702; 27 L. Ed., 584, 588; 2 Sup. Ct. Rep., 732; *Ouachita & M. River Packet Co. vs. Aiken*, 121 U. S., 444, 447; 30 L. Ed., 976, 977; 1 Inters. Com. Rep., 379; 7 Sup. Ct. Rep., 907); tolls for the use of an improved waterway (*Sands vs. Manistee River Improv. Co.*, 123 U. S., 288, 295; 31 L. Ed., 149, 151; 8 Sup. Ct. Rep., 113).

"Indeed, with respect to injuries that result in death, it already is settled that although the general maritime law, like the common law, afforded no civil remedy for death by wrongful act (*The Harrisburg*, 119 U. S., 199; 30 L. Ed., 358; 7 Sup. Ct. Rep., 140; *The Alaska*, 130 U. S., 201, 209; 32 L. Ed., 923, 925; 9 Sup. Ct. Rep., 461), yet a right of action created by statute is enforceable in a State court although the tort was committed upon navigable water (*American S. B. Co. vs. Chase*, 16 Wall., 522, 533; 21 L. Ed., 369; 372; *Sherlock vs. Alling*, 93 U. S., 99, 104; 23 L. Ed., 819, 820), and the liability arising out of a State statute in such a case will be recognized and enforced in the admiralty (*The Hamilton* (*Old Dominion S. S. Co. vs. Gilmore*), 207 U. S., 398; 52 L. Ed.,

> 264; 28 Sup. Ct. Rep., 133), although not by proceeding *in rem* unless the statute expressly creates a lien (*The Corsair* (*Barton vs. Brown*), 145 U. S., 335, 347; 36 L. Ed., 727, 731; 12 Sup. Ct. Rep., 949)."
>
> *Southern Pacific Co. vs. Jensen,* dissenting opinion of Mr. Justice Pitney.

Both the prevailing and dissenting opinions in Southern Pacific Co. vs. Jensen therefore recognize that the field of maritime injuries is one susceptible of concurrent legislative power of the States, provided only (as to the prevailing opinion) that the permission of Congress for the exercise of such power be evidenced.

Independently of the Jensen case, such power of Congress in maritime matters has been recognized by this court.

In *The Hope,* 10 Peters, 108, Mr. Justice Story, speaking of the adoption of State pilotage laws by Congress, spoke as follows:

> "The jurisdiction of a District Court of the United States, in cases of admiralty and maritime jurisdiction, is not ousted by the adoption of the State laws by the act of Congress. The only effect is to leave the jurisdiction concurrent in the State courts; and if the party should sue in the admiralty, to limit his recovery to a precise sum to which he would be entitled under the State laws adopted by Congress, if he should sue in the State courts."

In a similar field of Federal power this court spoke as follows, in *Sturges vs. Crowninshield,* 4 Wheat., 122, at 196:

> "If, in the opinion of Congress, uniform laws governing bankruptcies ought not to be established, it does not follow that partial laws may not exist, or that State legislation on the subject must cease. It is not the mere existence of the power, but its exercise, which is incompatible with the exercise of the same power by the States. It is not the right to establish these uniform laws, but their actual establishment, which is inconsistent with the partial acts of the

> States. If the right of the States to pass a bankrupt law is not taken away by the mere grant of that power to Congress, it cannot be extinguished. It can only be suspended by the enactment of a general bankrupt law. The repeal of that law cannot, it is true, confer the power on the States, but it removes the disability to its exercise which was created by the act of Congress."

The following is quoted from Cooley, General Principles of Constitutional Law, 3d Ed., page 35:

> "The mere grant of a power to Congress does not of itself necessarily imply a prohibition upon the States to exercise a like power. The full sphere of Federal powers may, at the discretion of Congress, be occupied or not, as the wisdom of that body may determine. If not fully occupied, the States may in some instances legislate within the same sphere, subject, however to any subsequent legislation that Congress may adopt. It is not the mere grant of a national power but its exercise which is incompatible with the exercise of the same power by the States."

Finally, the very existence of the saving clause for one hundred thirty years under which State statutes have been enforced constantly in maritime matters, both in the admiralty and in State courts, fully establishes the contention.

III. Discussion of Southern Pacific Co. vs. Jensen.

The attack upon the constitutionality of the Johnson Amendment is predicated almost entirely upon the Jensen decision.

The Jensen case does not support the contentions made for it, for the following reasons:

A. The actual *ratio decidendi* of the Jensen decision support, rather than oppose, the validity of the act of Congress.

The *ratio decidendi* of the case are:

1. The silence of Congress with respect to State participation in maritime matters is deemed equivalent, in view of the necessity for uniformity, to a declaration by Congress that the field shall remain free from State interference.

2. The former saving clause, extending a certain concurrent power to the States, does not include compensation acts, which are of a character unknown to the common law.

It follows from the first proposition above that Congress has power to make a declaration either for or against concurrent power by the State, else its presumed intent, deduced from its silence, would be immaterial. If Congress were powerless to authorize State participation, the Vance, Bowman, and Clark Distilling Co. cases, cited in the excerpts, *supra*, from the Jensen case, would be entirely irrelevant.

It follows from the second proposition that Congress has power to include workmen's compensation acts in the saving clause, else inquiry by this court into whether they were so included would have been without point.

B. The court is speaking in the Jensen case, not of the power of Congress over maritime matters, but of the supremacy of the general (non-statutory) maritime law over State legislation unauthorized by Congress. The consideration of uniformity is held important only to assist in drawing the conclusion that the silence of Congress is equivalent to its express declaration reserving the entire field to the Federal Government. It is not stated or intended to be applied to an act of Congress, as none was before the court.

Stated in another way, the New York compensation act failed in the Jensen case, not because it was in direct violation of article 3, section 2, of the Constitution, but because the State of New York had attempted to enter a field which the Constitution authorized the Federal Government to occupy, concurrently or exclusively, and which the Federal

Government had impliedly elected to fully occupy. *A rule of law prohibiting trespassing upon a person's property in his absence and without his consent cannot by any form of logic be held to include, by implication, the prohibition of the owner's bringing guests onto the property with his express invitation.* Yet this is the construction plaintiff in error seeks to put upon the Jensen case.

It should be noted that the maritime law is not stated in the decision to be incorporated into the Constitution. The Constitution makes no body of law, common law, equity, admiralty, or international law, of constitutional rank and superior to the control of Congress. The general maritime law is, instead, stated to have been incorporated into the *national laws,* and hence subject to the power of Congress to the same extent as its statutes.

C. The reference in the Jensen case to the grant to Congress of power to regulate commerce is conclusive of the constitutionality of the Johnson Amendment. In the Jensen case the majority of the court spoke as follows:

> "A similar rule in respect to interstate commerce, deducted from the grant to Congress of power to regulate it, is now firmly established. 'Where the subject is national in its character, and admits and requires uniformity of regulation, affecting alike all the States, such as transportation between the States, including the importation of goods from one State to another, Congress can alone act upon it and provide the needed regulations. The absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free.' *Bowman vs. Chicago & N. W. R. Co.*, 125 U. S., 465, 507, 598; 31 L. Ed., 700, 714, 715; 1 Inters. Com. Rep., 823; 8 Sup. Ct. Rep., 689, 1062; *Vance vs. W. A. Vandercook Co.*, 170 U. S., 438, 444; 42 L. Ed., 1100, 1103; 18 Sup. Ct. Rep., 674; *Clark Distilling Co. vs. Western Maryland R. Co.*, 242 U. S., 311, *ante*, 180; L. R. A., 1917B, 1218; 37 Sup. Ct. Rep., 180, decided January 8, 1917. *And the same character of reasoning*

> *which supports this rule, we think, makes imperative the stated limitation* upon the power of the States to interpose where maritime matters are involved."

By the above excerpt the court places the power of the States to regulate the movement of articles in interstate commerce, and to regulate maritime injuries, upon exactly the same footing. A brief review of the subject-matter of the three cases cited with reference to interstate commerce is therefore in order.

In the *Bowman* case, above cited, and later in *Leisy vs. Hardin*, 135 U. S., 100, the court enunciated the "original package" doctrine. This doctrine is that intoxicating liquors being shipped from one State to another are immune from State prohibitory laws after importation into a State and until they are mingled with the general body of goods within the State by sale or breaking up of the original package. In the *Bowman* case, however, the power of Congress is recognized to expand State powers, the following being quoted from the syllabus:

> "A State cannot, for the purpose of protecting its people against the evils of intemperance, enact laws which regulate commerce between its people and those of other States of the Union, *unless the consent of Congress, express or implied, is first obtained.*" (Italics ours.)

In *Leisy vs. Hardin, supra*, the court held that the power of Congress to regulate interstate commerce with respect to intoxicating liquors was exclusive, and that the absence of any law of Congress was equivalent to its declaration that the States should not interfere. *But the court also stated in that case that Congress could place such subject-matter within the jurisdiction of the States, by affirmative action.*

Following *Leisy vs. Hardin*, and to overcome its effect, Congress in 1890 enacted the Wilson act (26 Stat., 313, c. 728), in which it was declared that intoxicating liquors in

interstate commerce should become subject to State laws immediately upon importation, without waiting for sale or the breaking up of the original package. This law was declared constitutional in *In re Rahrer*, 140 U. S., 545, notwithstanding the contentions there made that the act amounted to a delegation of Federal legislative power to the States, and disregarded the uniformity desired by the Constitution to be secured by Federal control of interstate commerce.

In the *Vance* case, also quoted in the Jensen case, the constitutionality of the Wilson act was expressly upheld against these contentions.

As the Wilson act failed to completely vest in the States the power to prohibit importation of intoxicating liquors, it was eventually superseded by the Webb-Kenyon act (37 Stat., 699, c. 90). This act prohibits all importation of intoxicating liquors into States whose laws prohibit such importation. Its effect is indicated by a portion of its title: "An act to divest intoxicating liquors of their interstate character in certain cases." By this act Congress has affirmatively removed all barriers arising under the commerce clause of the Federal Constitution, against the power of the States to prevent importation of alcoholic liquors.

The constitutionality of the Webb-Kenyon act was upheld by this court in the *Clark Distilling Co.* case, also cited in the Jensen case.

The fact that in all three of the cases cited in the prevailing opinion in the Jensen case, the power of Congress to affirmatively extend the power of the States is specifically upheld, indicates that the court in the Jensen case believed Congress to have such power with respect to maritime injuries, as it held the same character of reasoning to be applicable in both cases.

If it be urged that the constitutionality of the Webb-Kenyon act depends solely upon the peculiar character of the article of commerce regulated, *i. e.*, intoxicating liquors,

and that such holding is not an authority for any other case involving the relinquishment to the States of a portion of Federal jurisdiction, the answer is twofold:

(1.) The power of Congress necessarily depends upon general rules. This court cannot legislate exceptions based upon specific articles of commerce. The decision must therefore stand upon the proposition that Congress has power to relinquish to the States in its discretion any portion of the field of regulation of interstate commerce in which the State is directly interested as a matter of self-protection.

(2.) Alcoholic liquors and industrial injuries are in the same class in any event for the purpose of prevention and redress by State statutes, as both affect the social welfare of the State by rendering a certain portion of its residents economic liabilities instead of economic assets, and tending to make such residents and their families a burden upon State charities and institutions. The redress of both is within the police power of the State as a matter of self-protection.

D. Deceased was not employed in interstate or foreign commerce by water, and the reasoning of the Jensen case fails.

In the Jensen case this court stated as follows:

> "It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character *affecting the intercourse of the States with each other or with foreign States.*" * * *
>
> "And plainly, we think, no such legislation is valid if it contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law *in its international and interstate relations.*" * * *

> "A similar rule in respect to interstate commerce, deducted from the grant to Congress of power to regulate it, is now fi[illegible]ly established. 'Where the subject is *national* in its character, and admits and requires uniformity [illegible] regulation, affecting alike all the States, *such as* [illegible]*nsportation between the States, including the impor[illegible]ation of goods from one State to another*, Congress can alone act upon it and provide the needed regulations. The absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free." *Southern Pacific Co. vs. Jensen.* (Italics ours.)

In the Jensen case the employee was injured while loading a vessel engaged in interstate comme[illegible]. In the case at bar deceased was employed [illegible]out a barge employed solely in intrastate transportation within the State of New York and in no wise affecting interstate or foreign commerce. The considerations which prevailed upon the court in that case to exclude New York from the power to protect its own citizens against injury in the operation of its own industries do not apply here.

IV. The Commerce Clause, Herein Discussing the Lottawanna.

Reference was made in the Jensen case, and also in plaintiff in error's brief in the present case, to *The Lottawanna*, and counsel endeavors to set up this case as an authority in support of his contentions. It is therefore advisable to study the decision of the court in *The Lottawanna* carefully. Upon so doing it is noted that while some portions of the dicta contained in that case tend to support counsel's contentions, the points actually decided are to the opposite effect and render the case a strong one in support of our contentions.

The Lottawanna establishes the following fundamental principles:

1. The general maritime law of the United States is not the general maritime law of the world, but only such portions thereof with local changes as constitute the *received* law of the United States.

2. Congress has power under the commerce clause to amend the maritime law with respect to the rights of seamen and redress of injuries sustained by them.

3. Congress has power under the commerce clause to permit State legislation to alter the law maritime.

4. A lien created by State statute for supplies furnished a vessel in her home port is enforceable as part of the maritime law.

In support of these contentions it is necessary only to quote the following from Mr. Justice Bradley's opinion:

From page 576:

> "But what the law is within those limits, assuming the general maritime law to be the basis of the system, depends on what has been received as law in the maritime usages of this country, and on such legislation as may have been competent to affect it." * * *

From page 577:

> "It cannot be supposed that the framers of the Constitution contemplated that the law should forever remain unalterable. Congress undoubtedly has authority under the commercial power, if no other, to introduce such changes as are likely to be needed. * * * Under it Congress has regulated the registry, enrollment, license, and nationality of ships and vessels; * * * *the rights and duties of seamen; the limitations of the responsibility of ship-owners for the negligence and misconduct of their captains and crews;* and many other things of a character truly maritime." * * *

From page 579:

> "It seems to be settled in our jurisprudence that so long as Congress does not interpose to regulate the subject, the rights of material men furnishing necessaries to a vessel in her home port may be regulated in each State by State legislation." * * *

From page 581:

> "But, whatever may have been the origin of the practice, and whether or not it was based on the soundest principles, it became firmly settled, and it is now too late to question its validity. * * *
>
> "It would undoubtedly be far more satisfactory to have a uniform law regulating such liens, but until such a law be adopted (supposing Congress to have the power) the authority of the States to legislate on the subject seems to be conceded by the uniform course of decisions.
>
> "Indeed, there is quite an extensive field of border legislation on commercial subjects (generally local in character) which may be regulated by State laws until Congress interposes, and thereby excludes further State legislation. Pilotage is one of the subjects in this category. So far as Congress has interposed, its authority is supreme and exclusive; but where it has not done so, the matter is still left to the regulation of the State laws."

It is submitted that the above excerpts from *The Lottawanna* support the constitutionality of the Johnson Amendment in that they establish the power of Congress to permit State legislation concerning matters of maritime commerce.

V. Uniformity of Maritime Law.

Plaintiff in error claims that necessity for uniformity of maritime law is constitutionally mandatory so as to constitute a limitation upon the power of Congress. Plaintiff's authorities, we have just shown, do not support this proposition.

Further, if our main contention in this brief is correct,

that Congress has authority to permit concurrent jurisdiction of the States in maritime matters to any extent deemed wise by it, no question of uniformity can arise, as each State necessarily acts under its own laws.

Taking a more general view of the matter of uniformity the following is submitted:

A. If the act be considered not to be of uniform application, it still violates no constitutional requirement. The Constitution does not require acts of Congress to be uniform except in a few cases specifically mentioned. Quoting from article 1, section 8:

> "1. The Congress shall have power to lay and collect taxes, duties * * *; but all taxes, imposts, and excises shall be uniform throughout the United States.
>
> "4. To establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States."

Quoting from article 1, section 9, subdivision 4:

> "No capitation, or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken."

The maxim, *inclusio unius exclusio alterius*, as well as sound logic, indicates that the Constitution does not require uniformity of acts of Congress in respect to the other powers granted. It will be noted that the Federal Constitution does not contain the requirement common to most State constitutions, that statutes shall be of a general or uniform operation, and prohibiting special or class legislation.

This court has, however, passed squarely upon the matter. In *U. S. vs. Union Pacific R. R. Co.*, 98 U. S., 569, at 603, it is held:

> "We say, therefore that with the exception of the Supreme Court, the authority of Congress, in creat-

> ing courts and conferring on them all or much or little of the judicial power of the United States, is unlimited by the Constitution."

The Lottawanna, 21 Wall., 558, does not hold, as claimed, that an act of Congress must be of uniform application. No act of Congress was there under consideration. On the contrary, like in *Re Rahrer, supra*, it upholds State legislation where not in conflict with an act of Congress.

B. The Johnson Amendment is in its last analysis of uniform application throughout the country.

In *In re Rahrer*, 140 U. S., 545, this court held the Wilson act, which similarly surrendered certain matters to the concurrent jurisdiction of the different States, to be of uniform application. Concerning the matter of uniformity this court said:

> "It (Congress) has taken its own course and made its own regulation, applying to those objects of interstate commerce one common rule, whose uniformity is not affected by violations of State laws dealing with such property."

C. In any event, it is respectfully submitted that the desire for uniformity is satisfied by the establishment of the principle in the Jensen case that no State law, except those expressly sanctioned therein, can be made applicable to maritime affairs except with the express consent of Congress. Whether Congress desires to exercise the prerogative given it of requiring uniformity against local regulation in all cases, is for it to determine.

VI. Election of Rights and Remedies, Herein Discussing The Howell.

In the report of the Senate Judiciary Committee recommending the adoption of the Johnson Amendment (our Appendix B), its effect was stated to be to give a maritime worker an election of remedies, *i. e.*, either to proceed in admiralty as theretofore or claim benefits under the workmen's compensation act. Under this construction the applicability of the New York compensation act is attacked by plaintiff in error upon the ground that the New York law contemplates that the compensation remedy, where applicable, should be the exclusive remedy. Therefore, the allowance of an alternative remedy by Federal statute constitutes either an amendment of the New York act by Congress or its application under circumstances not contemplated by the New York legislature.

A contrary construction of the act of Congress is given by Judge Learned Hand in *The Howell*, 257 Fed., 578. His interpretation is that in States where the compensation act is made the exclusive remedy, Congress intended to confirm such exclusive operation of the State law and therefore divested maritime workers injured in such States of all redress in admiralty. The result of this interpretation is also attacked by plaintiff in error, upon the ground that neither Congress nor the States can constitutionally deny a maritime worker access to the admiralty courts of the United States for a maritime injury.

Thus counsel seeks to create an inescapable dilemma. Upon close study of the situation, however, the difficulties raised by him disappear with remarkable rapidity.

To begin with, this is not the place to determine whether the construction given the Johnson Amendment by the Senate Judiciary Committee or by Judge Hand is the proper one. No question of interpretation of the amendment is

here involved. The compensation claimant is not here seeking relief in admiralty and does not complain of deprivation of any right in admiralty, and is therefore equally entitled to compensation upon either construction. All that need be established for present purposes is that either construction is free from constitutional difficulty. It is therefore respectfully submitted:

A. *The Senate Judiciary Committee's construction of election of remedies involves no constitutional defects.*

It is absurd upon the facts of the present case to say that the Johnson Amendment amounts to an amendment or alteration of the New York act by Congress or the uncontemplated application of it, for the reason, as shown in plaintiff in error's brief, page 10, that the New York legislature, *subsequent to October 6, 1917,* re-enacted the provisions of the workmen's compensation act including maritime employments, with express reference to the enactment of the Johnson Amendment as its reason therefor. If any amendment of the New York act is necessary, New York has made such amendment.

Further, the existence of a choice of remedies on the part of an injured maritime worker involves no unconstitutional burden on plaintiff in error. The existence of a choice in remedies in a plaintiff is nothing new and such situation has never been declared unconstitutional.

The choice of a Federal or State forum upon the ground of diversity of citizenship frequently involves a difference of substantive law, as in commercial cases, where the State court applies its own rule or decision, and the Federal court applies the general common law prevailing throughout the country, rejecting the law of the particular State. *Swift vs. Tyson,* 16 Pet., 1.

Comparing *The Max Morris,* 137 U. S., 1, with *Beldon vs. Chase,* 150 U. S., 674, the application of different principles

of liability in State and Federal courts is established, but no indication is made that the existence of an election of rights or remedies is invalid.

Similarly, in *Atlee vs. N. W. Union Packet Co.*, 21 Wall., 389, decided by unanimous court in the same term with *The Lottawanna*, it was held that where there was concurrent jurisdiction in the courts of common law and the courts of admiralty, each court was at liberty to adopt its own rule or decision. No intimation is made that the existence of an election of rights or remedies is unconstitutional.

Whether the decisions just referred to have been overruled by recent decisions of this court with respect to the application of different principles in the different courts, need not here be considered. The point is, that while these cases were considered law, no question of constitutionality was raised upon the ground of election of rights and remedies.

Singularly, the present situation is not produced by the act of a single sovereignty creating dual remedies. New York, acting within its police power, enacts the State compensation law, and can cover maritime employments therein with the consent of Congress. The Federal Government provides a general maritime law, and by the Johnson Amendment permits an election between the two. Each system is constitutional alone, and they are constitutional together.

B. *Under the construction of the Johnson Amendment given in The Howell, no constitutional difficulties appear.*

Plaintiff in error claims that a State cannot deprive a maritime worker of recourse to a court of admiralty. Conceding this bald statement, it has no bearing upon the case. We are not here concerned with the power of the *States*, but with the power of *Congress*. As heretofore shown, *Congress* may by express act relinquish the field of maritime injuries wholly or partially to the concurrent jurisdiction of

the States. If Congress so intends, it has the power to relinquish the field wholly, in which case the State law becomes the sole law applicable to the injury. It also has the power to repeal the right of action of a maritime worker under the general maritime law and thereby present a situation under which there is no substantive right in maritime law which can be enforced in an admiralty proceeding. (*The Howell, supra.*) Congress can repeal portions of the *general maritime law* as fully as it can repeal any *statute* enacted by it upon the same subject (*Southern Pacific Co. vs. Jensen* establishing the paramount power of Congress to fix and determine the law maritime).

If the construction given in *The Howell* of the effect of the Johnson Amendment be correct, Congress has in effect legislated that in States in which the workmen's compensation act is an exclusive remedy, the right of action in admiralty of a maritime worker is repealed. This Congress may do.

VII. Decisions Establishing Constitutionality of the Johnson Amendment.

Up to the present time the following decisions have been rendered in lower courts sustaining the constitutionality of the act of Congress here under consideration:

Stewart vs. Knickerbocker Ice Co., 226 N. Y., 302; 123 N. E., 382 (the present case).

Ruddy vs. Morse Dry Dock Co., 176 N. Y. S., 732.

The Howell, 257 Fed., 578.

No decisions have yet been rendered to the contrary effect.

PART III.

CONSIDERATIONS SUPPORTING THE CONSTITUTIONALITY OF THE ALLOWANCE OF WORKMEN'S COMPENSATION BENEFITS IN THE PRESENT CASE UPON SPECIAL AND LIMITED GROUNDS.

If the court sustains the constitutionality of the act of Congress here under consideration, the decision will control the entire field of State workmen's compensation laws in their maritime aspect. By way of supplement merely, and without weakening what has been said before, the writer desires to submit the following special considerations which do not go to the constitutionality of the Johnson Amendment but which, it is believed, sustain the application of the New York act to the present case in view of special factors involved herein.

I. The present case being one of fatal injury, for which the general maritime law makes no provision, no conflict exists and the State law may be applied.

As is well known to the court, the law maritime, like the common law, allows no recovery for tortious injuries resulting in death. *Causa moritur cum persona.* Relief is therefore given in admiralty only by the adoption of State death statutes.

Since the reason for excluding the New York compensation act in the Jensen case was that it came in conflict with the general maritime law, it would seem to follow that where the general maritime law is silent upon an entire division or chapter of its corpus, there should be nothing to prevent the State law from having application. Admiralty having never occupied the field of death cases, the States are not running against any Federal barrier in occupying the field.

Why this court did not so hold in the Jensen case, a death case, I have never been able to understand, particularly since it there recognized the obvious facts that State death statutes are enforceable in maritime cases. If the field is free to the States for negligence statutes, it should be equally free for any other form of relief provided by State law, as all intrude upon the law maritime equally.

The only distinction discernible between death statutes and compensation acts in the Jensen case is that the court considers the former to be within the saving clause of sections 24 and 256 of the Judicial Code, whereas compensation acts were unknown to the common law and not within it. If this be the only distinction, then the Johnson Amendment wipes out all distinction between the two.

II. The Present Case is Not One of Maritime Cognizance, as the Injury Occurred Upon the Land.

The test of maritime jurisdiction in tort is that of locality.

The Plymouth, 70 U. S. (3 Wall.), 20.

A tort occurring upon a wharf, dock or land to a person in maritime employment is not a maritime tort and the admiralty courts have no jurisdiction over it.

The Plymouth, supra.

Keator vs. Rock Plaster Mfg. Co., 256 Fed., 574.

In the present case the injury occurred upon the dock and is therefore non-maritime. It could not have been sued on in admiralty on any other theory than that of tort. Being non-maritime, there is no reason why the State compensation act cannot apply, regardless of the Johnson Amendment.

The view here expressed that where the tort in maritime employment occurs upon the land, the subject is non-maritime and the State compensation acts are therefore free to

operate, is not inconsistent with anything contained in the Jensen case, as the injury there occurred upon the ship.

The Keator case, *supra,* illustrates the necessity for clearer thinking on this ground. In that matter the injury occurred prior to the passage of the Johnson Amendment. An award of workmen's compensation benefits was annulled by the higher New York courts in 169 N. Y. S., 645, and 120 N. E., 56, upon the authority of the Jensen case. The reason given was that while the injury occurred upon land, the deceased was in maritime employment and the Jensen case governed. Petition for certiorari to this court was denied in 256 U. S., 574. Thereupon suit was brought in admiralty and the case dismissed for want of jurisdiction in 56 Fed., 574, upon the ground that the tort occurring upon the land, admiralty had no jurisdiction. It was there suggested that recourse might be had to the State death statute under the saving clause. Since, however, the New York compensation act is the exclusive remedy, it would seem to follow that the State death statute has been repealed as to all cases included within the apparent scope of the compensation act.

If the case comes to this court, will it reverse the well-established rule that locality is the test of admiralty jurisdiction in matters of tort? Or will it hold that the State workmen's compensation act is not barred for the reason that the injury was non-maritime? Or will it leave a twilight zone in which no law gives relief?

SUMMARY.

It is therefore respectfully submitted that the decision of the Court of Appeals of New York in the instant matter should be affirmed for the following reasons:

I. The Johnson Amendment is constitutional and applicable.

(*a*) It is sustained by the power of Congress to relinquish portions of the legislative and judicial field otherwise granted the United States to the concurrent power of the States.

(*b*) It is sustained by the paramount power of Congress to fix and determine the maritime law.

(*c*) It is sustained by the reasoning of the Jensen case.

(*d*) It is sustained by the actual holdings of *The Lotta-wanna*.

(*e*) It is sustained by the analogy of the Wilson and Webb-Kenyon acts heretofore held constitutional.

(*f*) FINALLY, AND MOST IMPORTANT, IT IS SUSTAINED BY THE UNCHALLENGED EXISTENCE OF THE "SAVING CLAUSE," CONFERRING CERTAIN CONCURRENT LEGISLATIVE AND JUDICIAL POWER ON THE STATES IN MARITIME CASES FOR OVER ONE HUNDRED THIRTY YEARS.

II. The allowance of workmen's compensation benefits in the present case is further sustained, leaving aside the Johnson Amendment, by these considerations:

(*a*) The State law is excluded only because it comes in conflict with maritime law, and the maritime law has no provision for fatal injuries. This is a fatal injury case.

(*b*) The State law is excluded only because it comes in conflict with the maritime law, and the maritime law makes no provision for injuries occurring on shore. The present injury occurred on shore.

Respectfully submitted,

WARREN H. PILLSBURY,
Counsel (as Amicus Curiæ) for the Industrial Accident Commission of the State of California.

APPENDIX A.

An Act

To amend sections twenty-four and two hundred and fifty-six of the Judicial Code, relating to the jurisdiction of the district courts, so as to save claimants the rights and remedies under the workmen's compensation law of any State.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That clause three of section twenty-four of the Judicial Code is hereby amended to read as follows:

"Third. Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it, and to claimants the rights and remedies under the workmen's compensation law of any State; of all seizures on land or waters not within admiralty and maritime jurisdiction; of all prizes brought into the United States; and of all proceedings for the condemnation of property taken as prize."

Sec. 2. That clause three of section two hundred and fifty-six of the Judicial Code is hereby amended to read as follows:

"Third. Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give

it, and to claimants the rights and remedies under the workmen's compensation law of any State."

Passed the Senate October 2, 1917.

Attest:

JAMES M. BAKER,
Secretary.

Passed House, October 5th. Approved October 6th.

APPENDIX B.

65th Congress, 1st Session. Report No. 139.

SENATE.

Amending the Judicial Code.

October 2, 1917.—Ordered to be printed.

Mr. Ashurst, from the Committee on the Judiciary, submitted the following:

REPORT.

(To accompany S. 2916.)

The Committee on the Judiciary, to which was referred the bill (S. 2916) to amend sections 24 and 256 of the Judicial Code, relating to the jurisdiction of the district courts, so as to save to claimants the rights and remedies under the workmen's compensation law of any State, having considered the same, recommend its passage without amendment.

The Judicial Code, by sections 24 and 256, confers exclusive jurisdiction on the district courts of the United States of all civil cases of admiralty and maritime jurisdiction, "saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it." It was declared by the Supreme Court of the United States in the case of *Southern Pacific Co. vs. Jensen* (Sup. Ct. Advance Opinions, No. 15, pp. 524-545) that "the remedy which the compensation statute attempts to give is of a character wholly unknown to the common law, incapable of enforcement by the ordinary processes of any court and is not saved to suitors

from the grant of exclusive jurisdiction." The bill (S. 2916) proposes only to amend the Judicial Code by so enlarging the saving clause as to include the rights and remedies under the compensation law of any State. Inasmuch as not only the remedy but sometimes the right under the compensation plan is unknown to the common law, both rights and remedies are included in the bill. The bill if enacted will not disrupt the admiralty jurisdiction of the Federal courts. The most that can be said of it will be that it is a recognition by Congress that a concurrent jurisdiction, State and Federal, should exist over certain matters. Actions that were formerly triable in admiralty courts will still be triable there. Where the cases were formerly triable only in such courts it will now be possible for the State, through its compensation plan, to determine the rights of the parties concerned. In other words, there being a concurrent jurisdiction, the injured party, or his dependents, may bring an action in admiralty or submit a claim under the compensation plan.

Office Supreme Court, U. S.
FILED
DEC 5 1919
JAMES D. MAHER,
CLERK.

Supreme Court of the United States

OCTOBER TERM, 1919.

No. 543.

KNICKERBOCKER ICE COMPANY
Plaintiff in error,

against

LILLIAN E. STEWART
Defendant in error.

IN ERROR TO THE APPELLATE DIVISION, THIRD DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK,

BRIEF IN BEHALF OF THE STATE INDUSTRIAL COMMISSION

CHARLES D. NEWTON,
Attorney-General.

E. CLARENCE AIKEN,
Deputy Attorney-General.
of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES

KNICKERBOCKER ICE COMPANY,
Plaintiff-in-Error,

against

LILLIAN E. STEWART,
Defendant-in-Error.

STATEMENT OF FACTS.

This is a writ of error to review an order of the Court of Appeals of the State of New York, which unanimously affirmed an order of the Appellate Division, Third Department, which in turn unanimously affirmed an award of the State Industrial Commission made to the widow and five children of William M. Stewart, deceased, for his death (fol. 48).

The defendant employer is engaged in the business of manufacturing and dealing in ice, and is a self-insurer under the New York law (fols. 5, 6, 11).

The deceased employee was a bargeman, working on a boat unloading ice at the wharf (fols. 5, 11, 25, 30). At the time in question the employees of the defendant were taking down the rigging on a barge and taking the ice off the boat and the

deceased employee, as he picked up a block of ice, fell over into the river and was drowned (fols. 30, 31). He left a widow and five infant children, to whom an award was made under the provisions of the Workmen's Compensation Law of the State of New York.

POINT I.

THE STATE INDUSTRIAL COMMISSION HAD JURISDICTION TO MAKE THE AWARD IN QUESTION.

The Majority opinion in the case of *Southern Pacific Co.* v. *Jensen,* held that in admiralty and maritime cases jurisdiction vested in the Federal courts because the remedy given by the compensation statute was of character wholly unknown to the common law, incapable of enforcement by the ordinary processes of any court, and, therefore, was not saved to suitors under the saving clause in the act passed by Congress and contained in the Judicial Code. On October 6, 1917, the Judicial Code was amended as follows: " The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several states.

> " Third of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common law remedy where the common law is competent to give it *and to claimants the rights and remedies under the workmen's compensation law of any state.*" (Judicial Code, Sec. 256; Sec. 1233 in the new revision.)
>
> " The district courts shall have original jurisdiction as follows:

" Third of all cases of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common law remedy where the common law is competent to give it *and to claimants the rights and remedies under the workmen's compensation law of any state;* of all seizures on land or waters not within admiralty and maritime jurisdiction; of all prizes brought into the United States; and of all proceedings for the condemnation of property taken as a prize." (Judicial Code, Sec. 24; Sec. 991 in the new revision.)

(The italics in the above quotations represent the amendments introduced by the Act of October 6, 1917. C. 97, Secs. 1, 2.)

The intended effect of the Amendment is best stated in the report of the Senate Judiciary Committee, as follows:

" 65th Congress, 1st Session. Report No. 139

" SENATE

" AMENDING THE JUDICIAL CODE.

" October 2, 1917 — Ordered to be printed.

" Mr. Ashurst, from the Committee on the Judiciary, submitted the following:

" REPORT.

"(To accompany S. 2916.)

" The Committee on the Judiciary, to which was referred the bill (S. 2916) to amend sections 24 and 256 of the Judicial Code, relating to the jurisdiction of the district courts, so as to save to

claimants the rights and remedies under the workmen's compensation law of any State, having considered the same, recommend its passage without amendment.

" The Judicial Code, by sections 24 and 256, confers exclusive jurisdiction on the district courts of the United States of all civil cases of admiralty and maritime jurisdiction, ' saving to suitors in all cases the right of a common law remedy where the common law is competent to give it.'

" It was declared by the Supreme Court of the United States in the case of *Southern Pacific Co.* v. *Jensen* (Sup. Ct. Advance Opinions, No. 15, pp. 524–545) that ' the remedy which the compensation statute attempts to give is of a character wholly unknown to the common law, incapable of enforcement by the ordinary processes of any court and is not saved to suitors from the grant of exclusive jurisdiction.' The bill (S. 2916) proposes only to amend the Judicial Code by so enlarging the saving clause as to include the rights and remedies under the compensation law of any state. Inasmuch as not only the remedy but sometimes the right under the compensation plan is unknown to the common law, both rights and remedies are included in the bill. *The bill if enacted will not disrupt the admiralty jurisdiction of the Federal Courts. The most that can be said of it will be that it is a recognition by Congress that a concurrent jurisdiction, State and Federal, should exist over certain matters.* Actions that were formerly triable in admiralty courts will still be triable there. Where the cases were formerly triable only in such courts it will now be possible

for the State, through its compensation plan, to determine the rights of the parties concerned. In other words, there being a concurrent jurisdiction, the injured party, or his dependents, may bring an action in admiralty or submit a claim under the compensation plan." (Italics ours.)

The amendment in question has been under consideration in four reported cases. In the case of *Duart* v. *Simmons,* 121 N. E. 10, the Supreme Court of Massachusetts had before it an action for tort for personal injuries in unloading coal from a vessel. It was urged in that case that the plaintiff was confined to the remedies afforded by the Workmen's Compensation Act. As the accident occurred before the passage of the amendment, it was not directly passed upon but the court says:

> "Seemingly the exclusive nature of the Federal jurisdiction has been released as to cases of this sort occurring since October 6, 1917 by U. S. statutes at large. C. 97, Sec. 2, approved on that date amending the Judicial Code of the United States, Sec. 256."

The Supreme Court of Louisiana had this question before it in the case of *Veasy* v. *Peters,* 77 So. Rep. 948, in which it was held that the amendment to the Judicial Code, being remedial in its nature, should have retroactive effect. It, therefore, reversed a former decree which set aside the judgment for compensation and ordered that the judgment appealed from be affirmed.

In the case of the *Steam Lighter Howell,* 252 Fed. Rep. 5[illegible]8, District Judge Learned Hand held that by virtue of the said amendment and the

exclusive nature of the New York Law, that an injured longshoreman was not entitled to prosecute a *libel in rem* against the Steam Lighter Howell. However, the contrary was held by District Judge Bean in the case of *Rohde* v. *Grant Smith Porter Co.*, 259 Fed. Rep. 304.

We have found no case in the lower courts which holds that Congress had no constitutional power to pass said amendment.

It will be noted that in the instant case we have the question of compensation for bargemen in handling ice upon one of the rivers of the country. The New York law does not apply to vessels of other states or countries used in interstate or foreign commerce (Sec. 2, Group 8).

POINT II

CONGRESS HAD JURISDICTION TO ENACT THE AMENDMENT TO THE JUDICIAL CODE, RESERVING THE RIGHTS AND REMEDIES UNDER THE COMPENSATION LAW OF ANY STATE WHERE SUCH RIGHTS AND REMEDIES HAD BEEN GIVEN BY ANY STATE.

In the case of *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, decided by the United States Supreme Court, the majority of that court held that the claimant in that case could not proceed under the Compensation Law for the reason that article III, section 2, of the Constitution extended the judicial power of the United States to all cases of admiralty and maritime jurisdiction; and article I, section 8, conferred upon Congress power "to make all of the laws which may be necessary and proper for carrying into

execution the foregoing powers and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof." Reference might also have been made to subdivision 3 of section 8, which gave Congress the power "to regulate commerce with foreign nations and among the several states and with the Indian tribes." The majority opinion states:

> "Considering our former opinions, it must be now accepted as settled doctrine that in consequence of these provisions Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country. *Butler* v. *Boston & Savannah SS. Co.*, 130 U. S. 527; *In re Garnett*, 141 U. S. 1, 14."

Referring then to section 9 of the Judiciary Act of 1789, which gave to the district courts of the United States "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction * * * saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it," it finds that the remedy which the compensation statute attempts to give is of a character wholly unknown to the common law, and is not saved to suitors from the grant of exclusive jurisdiction; and also that this remedy is not consistent with the policy of Congress to pass laws with reference to limitation upon the liability to ship owners.

It would, therefore, seem that according to the majority opinion that Congress had the power under the Federal Constitution to define and limit jurisdiction in admiralty cases.

It seems to be true that at the time of the Revolution and previous thereto, the English rule of admiralty jurisdiction was very narrow; that that narrow platform of jurisdiction was only what remained after centuries of strife between the courts of common law, which were jealous of the courts of admiralty.

Since the time of the Revolution there has been in England a move for a revival of the ancient admiralty jurisdiction. In 1840 the first of the so-called of the Admiralty Court Acts was passed, followed in 1846, 1854, 1861 and 1868 by other Acts all tending to give a broader and fuller jurisdiction to the High Court of Admiralty. In 1873 the High Court of Admiralty was united and consolidated with the Superior Courts of Common Law, the Court of Chancery of England, the Court of Probate and the Divorce Court, to form the Supreme Court of Judicature (Benedict's Admiralty, Chap. 7).

Parliament has also provided for workmen's compensation to master seamen, apprentices and members of the crew of any British ship or vessel (Workmen's Compensation Act, 1906, Sec. 7).

Mr. Justice Nelson in the case of *New Jersey Steam Navigation Co.* v. *Merchants Bank,* 47 U. S. 344, 385, says that admiralty jurisdiction in England, at the time of the adoption of our Constitution, was much more narrowly confined that it has been under the laws expounded by the courts of this country since the time of the adoption of the Constitution. The only feature which we have adopted from the English practice was the concurrent jurisdiction of courts of common law and this was safeguarded by the provision in the Constitution itself of the saving clause.

The Admiralty Law of England was originally of much narrower scope as above stated than has been finally settled as law in this country; under the influence of the English jurisdiction admiralty jurisdiction was confined by this court to cases arising upon waters within the ebb and flow of the tide (*The Thomas Jefferson,* 10 Wheat. 428; *Orleans* v. *Phoebus,* 11 Pet. 175). However, in the year 1845, Congress passed an act by which it was intended to extend the admiralty jurisdiction over the Great Lakes, and, apparently doubtful about applying such jurisdiction in all its details to waters so far inland inserted in the act a clause as follows:

> "Saving, however, to the parties the right of trial by jury of all facts put in issue in such suits, where either party shall require it."

This court in the case of *The Genesee Chief,* 12 How. 443, had under consideration the case of a collision on Lake Ontario. The court in its opinion, delivered by Mr. Chief Justice Taney in that case, held that this law was constitutional on the ground that the lakes are in truth inland seas. A great and growing commerce is carried on upon them; hostile fleets have encountered upon them, and prizes made; and every reason that existed for the grant of admiralty jurisdiction to the general government on the Atlantic seas applies with equal force to the lakes. He adverts to the fact that jurisdiction in England was confined to tide water and that that was so because there was no navigable stream in that country beyond the ebb and flow of the tide; and further, at the time of

the adoption of our Constitution, and, indeed, until the discovery of steamboats, there could be nothing like foreign commerce upon waters with an unchanging current resisting the upward passage. Therefore, the courts of the United States naturally adopted the English decisions upon the question of jurisdiction in the case of *The Thomas Jefferson* and *Orleans* v. *Phoebus* (*supra*). He says that decision was made in 1825, when the commerce on the rivers of the west and on the lakes was in its infancy, and of little importance, and but little regarded compared with that of the present day. He further says:

> "It is evident that a definition that would at this day limit public rivers in this country to tide-water rivers is utterly inadmissible. We have thousands of miles of public navigable water, including lakes and rivers in which there is no tide. And certainly there can be no reason for admiralty power over a public tide-water, which does not apply with equal force to any other public water used for commercial purposes and foreign trade. The lakes and the waters connecting them are undoubtedly public waters; and we think are within the grant of admiralty and maritime jurisdiction in the Constitution of the United States."

He then takes up the objection made in England to admiralty jurisdiction of the want of trial by jury and says:

> "But the act of Congress of which we are speaking is free from the objection to which the English statute is liable. Like the the English statute, it saves to the party a concurrent remedy at common law in any

court of the United States or of a State which may be competent to give it. But it goes farther. It secures to the parties the trial by jury as a matter of right in the admiralty courts. Either party may demand it. And it thus effectually removes the great and leading objection, always heretofore made to the admiralty jurisdiction.

The power of Congress to change the mode of proceeding in this respect in its courts of admiralty will, we suppose, hardly be questioned. The Constitution declares that the judicial power of the United States shall extend to 'all cases of admiralty and maritime jurisdiction.' But it does not direct that the court shall proceed according to ancient and established forms, or shall adopt any other form or mode of practice. The grant defines the subjects to which the jurisdiction may be extended by Congress. But the extent of the power as well as the mode of proceeding in which that jurisdiction is to be exercised, like the power and practice in all the other courts of the United States, are subject to the regulation of Congress, except where that power is limited by the terms of the Constitution, or by necessary implication from its language. In admiralty and maritime cases there is no such limitation as to the mode of proceeding, and Congress may therefore in cases of that description, give either party right of trial by jury, or modify the practice of the court in any other respect that it deems more conducive to the administration of justice. And in the proceedings under the act of 1845, the right to a trial by jury is undoubtedly secured to either party if he thinks proper to demand it."

Following *The Genesee Chief,* this court sustained the admiralty jurisdiction over rivers

(*The Magnolia*, 20 How. 296; *Hine* v. *Travers*, 4 Wall. 555), and in *Ex parte Boyer*, 109 U. S. 629, and *The Robert W. Parsons*, 191 U. S. 17, held that admiralty also covers the canals of the country.

a. *The Plan and Purpose of the Constitution in Reference to Jurisdiction.*

We could not do better than to quote from the admirable opinion of Mr. Justice Pitney in the case of *Southern Pacific Co.* v. *Jensen* upon this subject, which we think must have been concurred in in this respect as in the majority opinion we have the statement, "considering our former opinions it must now be accepted as settled doctrine that in consequence of these provisions, Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country," and this is reasserted in the majority opinion in the case of *Chelentis* v. *Luckenbach Steamship Co.*, 247 U. S. 72. I will, however, quote from several of the cases referred to by Mr. Justice Pitney in said opinion. In the case of *Martin* v. *Hunter's Lessee*, 14 U. S. 326, 327, Mr. Justice Story says:

> "The constitution unavoidably deals in general language. It did not suit the purposes of the people, in framing this great charter of our liberties, to provide for minute specifications of its powers, or to declare the means by which those powers should be carried into execution. It was foreseen that this would be a perilous and difficult, if not an impracticable, task. The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a

long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence. It could not be foreseen what new changes and modifications of power might be indispensable to effectuate the general objects of the charter; and restrictions and specifications, which, at the present, might seem salutary, might, in the end, prove the overthrow of the system itself. Hence its powers are expressed in general terms, leaving to the legislature from time to time, to adopt its own means to effectuate legitimate objects, and to mould and model the exercise of its powers, as its own wisdom and the public interests, should require."

Mr. Chief Justice Marshall had occasion to consider the clause of the Constitution which provides for the extension of judicial power to all cases of admiralty and maritime jurisdiction in the early case of *United States* v. *Beavans,* 3 Wheat. 336, 386. In that case a marine, duly enlisted, was indicted and tried for murder on board the United States Ship of War "Independence," as it lay in Boston Harbor. He was tried before a Circuit Court of the United States of the District of Massachusetts, and the question was as to jurisdiction or cognizance of this Circuit Court and the delimitation of that jurisdiction with that of the state. He says:

"What then is the extent of jurisdiction which a state possesses?

We answer, without hesitation, the jurisdiction of a state is co-extensive with its territory; co-extensive with its legislative power.

The place described is unquestionably within the original territory of Massachusetts. It is then within the jurisdiction of

Massachusetts, unless the jurisdiction has been ceded to the United States.

It is contended to have been ceded by that article in the constitution which declares, that ' the judicial power shall extend to all cases of admiralty and maritime jurisdiction.' The argument is, that the power thus granted is exclusive; and that the murder committed by the prisoner is a case of admiralty and maritime jurisdiction.

Let this be admitted. It proves the power of congress to legislate in the case; not that congress has exercised that power. It has been argued, and the argument in favour of, as well as that against the proposition, deserves great consideration, that courts of common law have concurrent jurisdiction with courts of admiralty, over murder committed in bays, which are inclosed parts of the sea; and that for this reason the offence is within the jurisdiction of Massachusetts. But in construing the act of congress, the court believes it to be unnecessary to pursue the investigation which has been so well made at the bar respecting the jurisdiction of these rival courts."

* * * * * * * *

" Can the cession of all cases of admiralty and maritime jurisdiction be construed into a cession of the waters on which those cases may arise?

This is a question on which the court is incapable of feeling a doubt. The article which describes the judicial power of the United States is not intended for the cession of territory or of general jurisdiction. It is obviously designed for other purposes. It is in the 8th section of the 2d article, we are to look for cessions of territory and of exclusive jurisdiction over this district, and over all places purchased by the consent of the legis-

lature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock yards, and other needful buildings.

It is observable, that the power of exclusive legislation (which is jurisdiction) is united with cession of territory, which is to be the free act of the states. It is difficult to compare the two sections together, without feeling a conviction, not to be strengthened by any commentary on them, that, in describing the judicial power, the framers of our constitution had not in view any cession of territory, or, which is essentially the same, of general jurisdiction.

It is not questioned, that whatever may be necessary to the full and unlimited exercise of admiralty and martitime jurisdiction, is in the government of the union. Congress may pass all laws which are necessary and proper for giving the most complete effect to this power. Still the general jurisdiction over the place, subject to this grant of power, adheres to the territory, as a portion of sovereignty not yet given away. The residuary powers of legislation are still in Massachusetts. Suppose, for example, the power of regulating trade had not been given to the general government. Would this extension of the judicial power to all cases of admiralty and maritime jurisdiction, have divested Massachusetts of the power to regulate the trade of her bay? ''

The object of the Constitution was to enumerate rather than to define the powers granted. *Gibbons* v. *Ogden,* 9 Wheat. 189, 196; *Passenger cases,* 7 How. 283, 549; *Lottery case,* 188 U. S. 321, 346.

The reason for adopting the general outlines only was well expressed by Chief Justice Mar-

shall in *McCulloch* v. *Maryland*, 4 Wheat. 316, 407:

> "A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American constitution is not only to be inferred from the nature of the instrument, but from the language."

This is also stated by Mr. Justice Baldwin in the case of *State of Rhode Island* v. *State of Massachusetts*, 12 Peters 657, 721. He says:

> "Our next inquiry will be, whether we have jurisdiction of the subject matters of the suit, to hear and determine them.
>
> That it is a controversy between two states, cannot be denied; and though the constitution does not, in terms, extend the judicial power to all controversies between two or more states, yet it in terms excludes none, whatever may be their nature or subject. It is, therefore, a question of construction, whether the controversy in the present case is within the grant of judicial power. The solution of this question must neeessarily depend on the words of the constitution; the meaning and intention of the convention which framed and proposed it for adoption and ratification to the conventions of the peo-

ple of and in the several states; together with a reference to such sources of judicial information as are resorted to by all courts in construing statutes, and to which this court has always resorted in construing the constitution. It was necessarily left to the legislative power to organize the Supreme Court, to define its powers consistently with the constitution, as to its original jurisdiction; and to distribute the residue of the judicial power between this and the inferior courts, which it was bound to ordain and establish, defining their respective powers, whether original or appellate, by which and how it should be exercised. In obedience to the injunction of the constitution, congress exercised their power, so far as they thought it necessary and proper, under the seventeenth clause of the eighth section, first article, for carrying into execution the powers vested by the constitution in the judicial, as well as all other departments and officers of the government of the United States. 3 Wheat. 389. No department could organize itself; the constitution provided for the organization of the legislative power, and the mode of its exercise, but it delineated only the great outlines of the judicial power; 1 Wheat. 326; 4 Wheat. 407; leaving the details to congress, in whom was vested, by express delegation, the power to pass all laws necessary and proper for carrying into execution all powers except their own. The distribution and appropriate exercise of the judicial power, must therefore be made by laws passed by congress, and cannot be assumed by any other department; else, the power being concurrent in the legislative and judicial departments, a conflict between them would be probable, if not unavoidable, under a constitution of government which made it the duty of the judicial

power to decide all cases in law or equity arising under it, or laws passed, and treaties made by its authority.

By the judiciary act of 1789, the judicial system of the United States was organized, the powers of the different courts defined, brought into action, and the manner of their exercise regulated. The 13th section provided 'That the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except also between a state and citizens of other states or aliens; in which latter case, it shall have original, but not exclusive jurisdiction.' 1 Story's Laws, 59.

The power of congress to make this provision for carrying into execution the judicial power in such cases, has never been, and we think cannot be questioned; * * *"

The United States Constitution is in effect a mere form or skeleton of government, or a body not instinct with life until made so by congressional legislation. We might apply to it the figurative language which Daniel Webster used with reference to Alexander Hamilton—"He smote the rock of the national resources and abundant streams of revenue gushed forth. He touched the dead corpse of public credit and it sprung upon its feet."

That Congress has authority to define and limit jurisdiction in admiralty cases would seem to follow from its power with reference to other cases. Subdivision 1 of section 2 of article III says that judicial power shall extend to controversies between citizens of different states. Congress, upon this subject of jurisdiction, has provided that the Federal courts only have jurisdiction as

between citizens of different states where the amount in controversy is $2,000; and the United States Supreme Court has refused jurisdiction in cases where that amount was not in dispute.

Holt v. *Indiana Manufacturing Co.*, 176 U. S. 68.

So also

United States v. *Sayward*, 160 U. S. 493, 498.

Even before the amendment to the section of the Judicial Code, Mr. Justice Reynolds, in his opinion, says:

> "It would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified or effected by state legislation. That this may be done to some extent cannot be denied."

He then refers to enforcement of liens upon vessels for repairs and the right given by State statutes to recover in death cases.

To this may be added the cases cited by Mr. Justice Hughes in the *Minnesota Rate Cases*, 230 U. S. 352, at page 403, and the following pages through State regulations of pilotage, harbor, bay and river improvements, bridges, wharfage charges and vessel quarantine, all of which are within State regulation. It also appears in earlier cases which he does not review that States have, with the permission of Congress, exclusive jurisdiction over crimes committed on navigable waters within their boundaries. (*United States* v. *Beavans*, 3 Wheat. 336; *People* v. *Welch*, 141 N. Y. 266); that the States have complete power to protect fisheries (*Manchester* v. *Massachu-*

setts, 139 U. S. 240), oyster beds (*McCreedy* v. *Virginia,* 94 U. S. 391), and sponges (*The Abbey Dodge,* 223 U. S. 166) in public waters of the United States. And since the decision in the *Minnesota Rate Cases* the Supreme Court has sustained the power of a State to compel a railroad doing business as an interstate carrier by land and by water to pay its employees semimonthly (*Erie Railroad Company* v. *Williams,* 233 U. S. 685).

So as to harbor improvements, *County of Mobile* v. *Kimball,* 102 U. S. 691, 697; improvements and obstructions to navigation, *Huse* v. *Glover,* 119 U. S. 543, 548; *Leovy* v. *United States,* 177 U. S. 621, 625; *Cummings* v. *Chicago,* 188 U. S. 410, 427; inspection and quarantine laws, *Gibbons* v. *Ogden,* 9 Wheat. 1, 203; wharfage charges, *Packet Co.* v. *Keokuk,* 95 U. S. 80; *Packet Co.* v. *Catlettsburg,* 105 U. S. 559, 563; *Transportation Co.* v. *Parkersburg,* 107 U. S. 691, 702; *Ouachita Packet Co.* v. *Aiken,* 121 U. S. 444, 447; tolls for the use of an improved waterway, *Sands* v. *Manistee River Imp. Co.,* 123 U. S. 288, 295.

So, of provisions fixing the tolls for transportation upon an interstate ferry, *Port Richmond Ferry* v. *Hudson County,* 234 U. S. 317, 331; or upon vessels plying between two ports located within the same State, *Wilmington Transp Co.* v. *California Railroad Commission,* 236 U. S. 151, 156.

See also *Clark D. Stilling Co.* v. *Western Maryland Ry. Co.,* 242 U. S. 311.

It has been held by the United States Supreme Court that the exception " of saving to suitors,

in all cases, the right of common law remedy, where the common law remedy is competent to give it," did not mean necessarily a common law action but that the remedy might be any means employed to enforce the rights or redress the injury (*Knapp, Stout & Co.* v. *McCaffery*, 177 U. S. 638, 644). Mr. Justice Brown says at page 644:

> "The real question is whether the proceeding taken is within the exception 'of saving to suitors in all cases the right of a common law remedy, where the common law is competent to give it.' It was certainly not a common law action, but a suit in equity. But it will be noticed that the reservation is not of an *action* at common law, but of a common law remedy; and a remedy does not necessarily imply an action. A remedy is defined by Bouvier as 'the means employed to enforce a right, or redress an injury.' While, as stated by him, remedies for nonfulfillment of contracts are generally by action, they are by no means universally so. Thus, a landlord has at common law a remedy by distress for his rent — a right also given to him for the purpose of exacting compensation for damages resulting from the trespass of cattle. A bailee of property has a remedy for work done upon such property, or for expenses incurred in keeping it, by detention of possession. An innkeeper has a similar remedy upon the goods of his guests to the amount of his charges for their entertainment; and a carrier has a like lien upon the thing carried. There is also a common law remedy for nuisances by abatement; a right upon the part of a person assaulted to resist the assailant, even to his death; a right of recaption of goods stolen or unlawfully taken, and a public right against disturbers

of the peace by compelling them to give sureties for their good behavior. All these remedies are independent of an action."

Rights of action as well as remedies have been created by the different states involving maritime torts which the admiralty law has adopted, and enforcement thereof has been had either in admiralty or the State courts of this State. A statute was passed in New York giving a right of action for death, a right which was unknown to the common law. An action was brought under this statute in the case of *Dougan* v. *Champlain Transportation Co.*, 56 N. Y. 1, in which it was contended that there was want of jurisdiction in the State court to hear the case as it could not exercise admiralty jurisdiction. Judge Grover in his opinion says:

"The ground upon which the want of jurisdiction is claimed, is that the injury is a maritime tort, and therefore the case comes within the admiralty jurisdiction, which under the Constitution and laws of the United States is exclusively vested in the courts of that government. The State courts can exercise no admiralty jurisdiction. (*The Josephine*, 39 N. Y. 19; *Brookman* v. *Hamill*, 43 id. 554.) But conceding that redress for the injury complained of might have been obtained by proceedings in admiralty, it does not follow that the State courts have no jurisdiction. Section 9 of the judiciary act, passed by Congress in 1789, while vesting exclusive original jurisdiction of all civil causes of admiralty and martime jurisdiction in the District Courts of the United States, expressly saves to suitors, in all cases, the right of a common law remedy, when the common law is competent to give it. Section 1, chapter 29, of the Act of Congress, 1845, by

which the admiralty and maritime jurisdiction of the District Courts is extended to certain lakes and rivers, the jurisdiction of the State courts is preserved by still more comprehensive language, as follows: 'Saving, also, to the parties, the right of a concurrent remedy at the common law, when it is competent to give it, and any concurrent remedy which may be given by the State laws when such steamer or other vessel is employed in such business of commerce and navigation.' The argument against the jurisdiction of the State courts is, that inasmuch as the common law gave no right of action to the personal representatives for the recovery of damages for the pecuniary injury of the next of kin, caused by the death against those whose wrongful act caused it, there was no civil common law remedy for such an injury. This is true. Until a right exists there can be no remedy. But when a right is given, whether by the common law or statute, there must be some remedy when it is withheld. The right of the next of kin to compensation for the pecuniary injury is given by statute, and to enforce it a common law action is given to the personal representatives. It is this common law remedy that is saved in the acts above referred to. This is saved wholly irrespective of the foundation of the right to be enforced, whether upon the common law or statute. The intention of the statute was to confer exclusive admiralty and maritime jurisdiction upon the District Courts, at the same time leaving to the suitor his option of seeking redress at common law when it could be so obtained. This appears from the saving of common law remedies instead of common law rights. The former are preserved to the suitor in all cases, when competent, irrespective of the foundation of the latter, whether upon the common law or statutes.

It is further insisted that jurisdiction is taken away from the State courts by chapter 43, Act of Congress, 1851, limiting the liability of ship-owners and for other purposes. Section 3 of that chapter limits the liability of such owners to the value of the ship and freight then pending. It is obvious that this limited liability can be equally well enforced in a common law action, when, as in the present case, the injury is confined to one party, as though no such limit had been imposed. Section 4 of the act provides the mode to be adopted by the owner in case the injury is to several, and the value of the ship and freight then pending is insufficient to compensate all in full, to stay actions at common law in the State courts. The practice to be pursued for this purpose is discussed and determined in *Norwich Co.* v. *Wright* (13 Wallace 104). No such practice was or could have been adopted by the defendant in the present case, as the injury was sustained by a single party. It follows that the court had jurisdiction to try and give judgment in the case."

This was also the holding of the United States Supreme Court in the case of *Steamboat Co.* v. *Chase*, 83 U. S. 522. In that case Mr. Justice Clifford says:

"Suitors may have a common law remedy in all cases where the common law is competent to give it, but the defendants insist that a suitor cannot have redress in a common law court in such a case, even if the admiralty courts have jurisdiction, as the right of action was created by a State statute enacted subsequent to the passage of the Judiciary Act.

Attempt is made to deny the right to such a remedy in this case, upon the ground that the operation of the saving clause must be limited to such causes of action as were

known to the common law at the time of the passage of the Judiciary Act, and the argument is that the cause of action alleged was not known to the common law at that period, which cannot be admitted, as actions to recover damages for personal injuries prosecuted in the name of the injured party were well known, even in the early history of the common law. Such actions, it must be admitted, did not ordinarily survive, but nearly all the States have passed laws to prevent such a failure of justice, and the validity of such laws has never been much questioned."

To the same effect also the case of *Sherlock* v. *Alling*, 93 U. S. 99.

In the case of *The Hamilton*, 207 U. S. 398, the question was raised as to whether the statute of the State of Delaware would apply to the claim for death due to negligence occurring upon the high seas. Mr. Justice Holmes, who delivered the opinion of the court, says:

"Apart from the subordination of the State of Delaware to the Constitution of the United States there is no doubt that it would have had power to make its statute applicable to this case."

Later on in the opinion he proceeds:

" The first question, then, is narrowed to whether there is anything in the structure of the National Government and under the Constitution of the United States that takes away or qualifies the authority that otherwise Delaware would possess — a question that seems to have been considered doubtful in *Butler v. Boston & Savannah Steamship Co.*, 130 U. S. 527, 558. It has two branches: First, whether the state law is valid for any

purpose, and, next, whether, if valid, it will be applied in the admiralty. We will take them up in order.

The power of Congress to legislate upon the subject has been derived both from the power to regulate commerce and from the clause in the Constitution extending the judicial power to 'all cases of admiralty and maritime jurisdiction.' Art. 3, Sec. 2; 130 U. S. 557. The doubt in this case arises as to the power of the States where Congress has remained silent.

That doubt, however, cannot be serious. The grant of admiralty jurisdiction, followed and construed by the Judiciary Act of 1789, 'saving to suitors in all cases the right of a common law remedy where the common law is competent to give it,' Rev. Stats. Sec. 563, cl. 8, leaves open the common law jurisdiction of the State courts over torts committed at sea. This, we believe, always has been admitted. *Martin* v. *Hunter*, 1 Wheat. 304, 337; *The Hine* v. *Trevor*, 4 Wall. 555, 571; *Leon* v. *Galceran*, 11 Wall. 185; *Manchester* v. *Massachusetts*, 139 U. S. 240, 262. And as the State courts in their decisions would follow their own notions about the law and might change them from time to time, it would be strange if the State might not make changes by its other mouthpiece, the legislature. The same argument that deduces the legislative power of Congress from the jurisdiction of the National courts, tends to establish the legislative power of the State where Congress has not acted. Accordingly, it has been held that a statute giving damages for death caused by a tort might be enforced in a state court, although the tort was committed at sea. *American Steamboat Co.* v. *Chase*, 16 Wall. 522. So far as the objection to the state law is founded on the admiralty clause in the Constitution, it would seem not to matter whether the accident happened near shore

> or in mid-ocean, notwithstanding some expressions of doubt. The same conclusion was reached in *McDonald* v. *Mallory*, 77 N. Y. 546, where the death occurred on the high seas. *Sherlock* v. *Alling*, 93 U. S. 99, reinforces *Chase's case*, and answers any argument based on the power of Congress over commerce."

It appears to be settled, therefore, that the States may create a right and remedy in addition to a common law or admiralty remedy, which right and remedy may be pursued in the courts of the State. The State of New York has created a right and remedy by means of workmen's compensation, which right and remedy were not known to the common law or the law of admiralty and cannot be enforced in either one of those courts.

Without some law passed by the State of New York there would be no remedy to the widow and children of the deceased employee in this case. Admiralty afforded no remedy for death (*The Harrisburg*, 119 U. S. 199). However, where states have passed laws giving a remedy for death due to negligence, admiralty has recognized such remedy (*The Hamilton*, 207 U. S. 398). The State of New York has such a remedial statute in death cases (section 1902 of the Code of Civil Procedure). In the case of an employee, however, that remedy has been suspended by the compensation remedy, which is exclusive (section 11 of Compensation Law), and has been so declared by the Court of Appeals (*Shanahan* v. *Monarch Engineering Co.*, 219 N. Y. 469). Therefore, if the court will not allow the remedy invoked in this

case, this widow and children have no remedy at all.

We suggest that if Congress had the power to save the right to proceed at common law under the Federal government, it had also the right to allow procedure under some other form of remedy. That did not take away the jurisdiction of the admiralty courts or impair their jurisdiction, but allowed another remedy to be used in case one was not efficacious. We can see no difference between the power of Congress to save a common law remedy and one for compensation.

b. THE QUESTION OF UNIFORMITY

Much stress is laid by the majority opinion in the *Jensen* decision and in the brief of plaintiff-in-error in this case upon the uniformity of the maritime law, and both in that decision and in the brief great stress is laid upon certain expressions quoted from the *Lottawanna* case. All that was necessary to decide in the *Lottawanna* case was whether there was an implied lien for necessaries furnished to a vessel in the home port, where no such lien was recognized by the municipal law of the State, and as to whether on that issue the case of *The General Smith*, 4 Wheat. 438, should be overruled. Mr. Justice Bradley, however, undertakes to roam all over the field of admiralty and maritime law in the course of his opinion; and while paragraphs may be picked out to support the contention for a law operating uniformly in the whole country, there are other expressions also which recognize the undoubted power of Congress

to introduce such changes as are likely to be needed. We quote:

> " But, like those laws, however fixed, definite, and beneficial the theoretical code of maritime law may be, it can have only so far the effect of law in any country as it is permitted to have. But the actual maritime law can hardly be said to have a fixed and definite form as to all the subjects which may be embraced within its scope. Whilst it is true that the great mass of maritime law is the same in all commercial countries, yet, in each country, pecularities exist either as to some of the rules, or in the mode of enforcing them. Especially is this the case on the outside boundaries of the law, where it comes in contact with, or shades off into the local or municipal law of the particular country and effects only its own merchants or people in their relations to each other (p. 572). * * *
>
> But by what criterion are we to ascertain the precise limits of the law thus adopted? The Constitution does not define it. It does not declare whether it was intended to embrace the entire maritime law as expounded in the treatises, or only the limited and restricted system which was received in England, or lastly, such modification of both of these as was accepted and recognized as law in this country (p. 574).
>
> * * * * * * * *

If, within its proper scope, any change is desired in its rules, other than those of procedure, it must be made by the legislative department. It cannot be supposed that the framers of the Constitution contemplated that the law should forever remain unalterable. Congress undoubtedly has authority under the commercial power, if no other, to

introduce such changes as are likely to be needed" (p. 577).

However, with reference to the uniformity of admiralty and maritime law, there is really no question here. Congress is not attempting to disturb the uniformity of the maritime law. Whenever a case is brought in an admiralty court, the admiralty law will be enforced, the same in one State as in another; but wherever there is another remedy by way of workmen's compensation or a common law remedy, such remedies will be asserted and enforced in their respective jurisdictions according to the law of that jurisdiction. So far as the common law remedy is concerned, it cannot be claimed that that is the same the country over. New York has a system of practice under a code. Other states have codes of their own and some states still retain the common law practice and procedure.

This is recognized in the case of *Wheaton & Donaldson* v. *Peters & Grigg*, 33 U. S. 658, where it is stated in the opinion:

> "It is clear, there can be no common law of the United States. The federal government is composed of twenty-four sovereign and independent states; each of which may have its local usages, customs and common law. There is no principle which pervades the union and has the authority of law, that is not embodied in the constitution or laws of the union. The common law could be made a part of our feudal system, only by legislative adoption.
>
> When, therefore, a common law right is asserted, we must look to the state in which the controversy originated."

We may assume that there is more nearly a uniformity under the compensation laws which have now been passed by forty-two states of the union than there would be under the common law procedure.

In conclusion we say that in the case of *Southern Pacific Co.* v. *Jensen,* counsel for the State was intent on establishing the constitutionality of the Workmen's Compensation Law of New York and counsel for plaintiff-in-error in that case was striving to have it declared unconstitutional. The point upon which the case was finally decided was hardly touched in the briefs on either side, and Mr. Justice Pitney in his opinion points out that until the *Jensen* case the reported decisions of the court show not a trace of any such question raised.

We have then a situation in which bench and bar had assumed that the State courts had concurrent jurisdiction to decide cases where the claimant might also have a remedy in admiralty. In the *Jensen* case five state commissioners, five justices of the Appellate Division, seven judges of the Court of Appeals in New York, and four justices of this court, a total of twenty-one men, held that such concurrent jurisdiction existed, but five justices of this court overruled that decision, declaring the law was unconstitutional in maritime cases.

Now we come before this court again. This time we have the overwhelming majority of the House of Representatives and Senate, in which are many good lawyers, and the approval of the President of the United States. We have, as in

the *Jensen* case, the five commissioners and twelve judges of New York agreed upon the constitutionality of the Act of Congress, the aim and purpose of which is to ameliorate the harsh law of the sea (*The Osceola*, 89 U. S. 158, 175; *Chelentis* v. *Luckenbacher SS. Co.*, 247 U. S. 372).

Admiralty takes no account of permanent disability. It takes no account of dependent widows and children; and in this latter respect the uniformity of admiralty law, upon which so much stress is laid, does not exist. In the waters of a State which by legislation has given a right of action for death, admiralty may adopt that provision of the State statute and afford a remedy for death caused by negligence. In the waters of states which have no such statutes, the remedy is non-existent in admiralty.

If the Legislatures of all the states and the Congress of the United States cannot change a rule of law recently discovered to have been in force in the middle ages (Rules of Oleron, Article VI; Laws of Wisbey, Article 18; *The Osceola*, 189 U. S. 169) and, therefore, now in force, then we may truly say that we ought to go still further back and invoke the laws of the Medes and Persians or the Code of Hammurabi, section 5: "If a judge pronounce a judgment, render a decision, deliver a verdict duly signed and sealed and afterward alter his judgment, they shall call that judge to account for the alteration of the judgment which he had pronounced, and he shall pay twelvefold the penalty which was in said judgment; and in the assembly, they shall expel him from his seat

of judgment, and he shall not return, and with the judges in a case he shall not take his seat."

Respectfully submitted,

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